Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

MANUEL SALAZAR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court's holding, which focuses solely on outcome determination, conflicts with this Court's decision in *Lockhart v. Fretwell*?

2. Whether the Illinois Supreme Court improperly placed the burden on the State when analyzing Respondent's claim of ineffective assistance of appellate counsel under the prejudice prong of *Strickland v. Washington*?

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IN THE

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OCTOBER TERM, 1994

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

MANUEL SALAZAR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the Supreme Court of Illinois to review that court's judgment and opinion entered on September 22, 1994.

OPINIONS BELOW

The November 21, 1988, decision of the Illinois Supreme Court is published at 126 Ill. 2d 424, 535 N.E.2d 766 (1988). The September 22, 1994, decision of the Illinois Supreme Court is published at 162 Ill. 2d 513, 643 N.E.2d 698 (1994). Both of these decisions are reprinted in the appendix to this petition.

JURISDICTION

The Illinois Supreme Court entered its judgment on September 22, 1994, and rehearing was denied on December 5, 1994. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On December 6, 1985, an Illinois jury found Manuel Salazar guilty of the murder of Will County police officer Martin Murrin and sentenced him to death. Approximately two minutes after Officer Murrin had left his squad in pursuit of Salazar, witnesses heard five shots over an interval of about four seconds, with a pause after the first three shots. (R. 1998, 2055-56, 2068). Murrin had been shot five times with his own revolver. (R. 2771). Expert testimony established that one bullet, which had passed through Murrin's right ear from front to back, had been fired from six to twenty four inches away (R. 2779); two more entered Murrin's right chest between the nipple and collar bone, in a manner which indicated a firing range of less than six inches (R. 2780, 2783, 2787); a fourth bullet, which entered the left chest above the naval, had been fired from greater than two feet away (R. 2790) and; a fifth bullet, fired from approximately two feet away, entered Murrin's center forehead two inches below the top of his head. (R. 2772, 2774, 2776, 2807).

Among the injuries sustained by Murrin, independent of the gunshot wounds, were abrasions on the upper lip, the ear, the eyebrow, both arms, the left hand, both legs, and four parallel abrasions on the neck consistent with fingernail scratches. (R. 2773, 2792-94). The only evidence of injury to Salazar, aside from puffiness to his right eye, was a barbed wire type cut (R. 2276, 2278, 2380). Neither Offi-

cer Ponce (Murrin's partner), nor another individual who witnessed Salazar's "effortless escape," noticed anything unusual about Salazar's face when he was briefly viewed after the shooting as he vaulted barbed wire fences and ran some seven blocks through the woods to a friend's residence. (R. 1999, 2053, 3065-68, 3108, 2412-13).

The police recovered the clothing Salazar had been wearing at the time he murdered Officer Murrin. (R. 2360-61). Despite Salazar's claim that he and Murrin struggled side-by-side while the gun kept going off (R. 3132-33), the shoes tested negative for blood (R. 2969), and a yellow sweatshirt had only one small smear of human blood on the left shoulder and small droplets of blood on the lower right back of the shirt. (R. 2971-72). Furthermore, both areas were insufficient to permit group typing, and two small smears of blood identified inside the shirt did not soak through and were also insufficient to type. (R. 2972).

The same attorney represented Salazar both at trial and on direct appeal before the Illinois Supreme Court, which affirmed his conviction and death sentence. *People v. Salazar*, 126 Ill. 2d 424, 535 N.E.2d 766 (1988) (hereinafter *Salazar I*). Salazar, with the assistance of a new attorney, subsequently filed a post-conviction petition in the Circuit Court of Will County which alleged, *inter alia*, that Salazar had been denied the effective assistance of appellate counsel due to counsel's failure to argue that the voluntary manslaughter instructions given at trial were invalid under *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988),[1]

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[1] The *Reddick* court invalidated the Illinois Pattern Jury Instructions on murder and voluntary manslaughter after finding that these instructions should have placed on the prosecution the burden of disproving beyond a reasonable doubt that the defendant possessed a mitigating mental state. *Gilmore v. Taylor*, ____ U.S. ____, 113 S.Ct. 2112, 2115 (1993).

which was decided while Salazar's direct appeal was pending before the Illinois Supreme Court. An evidentiary hearing was held, at which counsel, who had represented Salazar at both trial and on direct appeal, testified that when Salazar's appeal was decided in November of 1988, he was unaware of the *Reddick* decision. Following this evidentiary hearing, that court denied relief and Salazar once again appealed to the Illinois Supreme Court.

On post-conviction appeal, the Illinois Supreme Court reversed and remanded for a new trial based upon a single issue, the ineffective assistance of appellate counsel. The court found that appellate counsel was in fact ineffective for failing to raise *Reddick* error on direct appeal. *People v. Salazar*, 162 Ill. 2d 513, 525, 643 N.E.2d 698, 705 (1994) (hereinafter *Salazar II*).

The People of the State of Illinois seek a writ of certiorari from this Court to review the judgment and opinion of the Illinois Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI IN THAT THE ILLINOIS SUPREME COURT'S HOLDING BELOW CONFLICTS WITH THIS COURT'S DECISION IN *LOCKHART v. FRETWELL*.

In *Lockhart v. Fretwell*, ____ U.S. ____, 113 S.Ct. 838, 842 (1993), this Court held that an analysis under *Strickland's* prejudice prong, which focuses solely on outcome determination, is defective. The Court noted that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Id.* Consequently, the Court reasoned that when a defendant is "deprived of neither a fair trial nor any of the specific constitutional rights de-

signed to guarantee a fair trial, he has suffered no prejudice." *Id.* at 843 *(quoting Nix v. Whiteside*, 475 U.S. 157, 186-87 (1986)).

The Illinois Supreme Court's decision below is in conflict with *Lockhart*. In its decision below, the court held: "We need not address the question of whether *Reddick* error is a constitutional violation in order to determine whether defendant is entitled to post-conviction relief. *Salazar II*, 162 Ill. 2d at 519, 643 N.E.2d at 702. The court nonetheless determined that it could consider Salazar's *Reddick* argument in the context of his allegation that appellate counsel was ineffective for failing to assert that there was reversible error in the jury instructions pursuant to the Illinois Supreme Court's decision in *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988). After concluding that counsel's failure to raise *Reddick* error amounted to deficient performance under *Strickland*, the court then analyzed whether Salazar had been prejudiced as a result of counsel's error. *Salazar II*, 162 Ill. 2d at 520, 643 N.E.2d at 703. In reaching an affirmative conclusion, the court erred for it found prejudice solely upon determining that, but for counsel's error, the outcome at trial could have been different. *Id.*, 162 Ill. 2d at 525, 643 N.E.2d at 705.

The Illinois Supreme Court's mere outcome-determinative analysis was defective. *Lockhart*, 113 S.Ct. at 843. The court's failure to address whether *Reddick* error is of constitutional magnitude precludes a finding of ineffective assistance of counsel under the Sixth Amendment. As the *Lockhart* Court stated, where a defendant has not been deprived of a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he suffers no prejudice. *Id.* at 843. Since *Reddick* involves an error of state instructional law, it deprived Salazar of neither a substantive nor a procedural federal constitutional right. *See Gil-*

more, 113 S.Ct. at 2118-19 (where the Court suggested that when there is a claim of error committed in instructing the jury with respect to an affirmative defense, which does not lessen the State's *Winship* burden in proving every element of the offense charged beyond a reasonable doubt, such an error is wholly one of state law).

Gilmore formally reserved the issue of whether Illinois Pattern Jury Instructions for murder and manslaughter, when given together, deprive a criminal defendant of due process of law. *See Thomas v. Peters*, 1995 U.S. App. LEXIS 3700 (7th Cir. Ill. Feb. 23, 1995) (slip op. at 16) (Easterbrook, Circuit Justice, concurring). Still, the Court stated that while "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," the application of this principle was strictly limited to situations involving the exclusion of evidence, *(see, e.g. Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 297 (1973)), or the testimony of defense witnesses, *(see, e.g. Webb v. Texas*, 409 U.S. 95, 98 (1972); *Washington v. Texas*, 388 U.S. 14, 98 (1967)), none of which involved restrictions imposed upon a defendant's ability to present an affirmative defense. *Gilmore*, 113 S.Ct. at 2118.

Justice O'Connor's concurrence in *Gilmore* also made clear that the issue of whether such erroneous jury instructions violate the Constitution was a question left unanswered by the Court's cases. *Gilmore*, 113 S.Ct. at 2122 (O'Connor, J. concurring). The concurrence noted that previous cases had established guidelines with respect to jury charges which required the State to prove every element of a criminal offense beyond a reasonable doubt, *(In re Winship*, 397 U.S. 358, 364 (1970)), and prohibited the State from using evidentiary presumptions that had the effect of relieving the State of its burden of persuasion beyond a rea-

sonable doubt of every essential element of a crime, *Francis v. Franklin*, 471 U.S. 307, 313 (1985). *Gilmore*, 113 S.Ct. at 2112. However, the Court's cases also made clear that there was an important distinction between elements of the offense and affirmative defenses. *Id.*

The difference between an element and an affirmative defense marks the difference between state and federal constitutional law. *See Estelle v. McGuire*, 502 U.S. 62 (1991) (where the Court held that instructional errors of state law may not form the basis for federal habeas relief); *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987) (where the Court rejected petitioner's claim that instructions which required her to prove self-defense by a preponderance of the evidence shifted to petitioner the burden of disproving the elements of the crime); *Engle v. Isaac*, 456 U.S. 107, 119-121, n. 21 (1982) (where the Court held that a challenge to the correctness of a self-defense instruction under state law provided no basis for federal habeas relief); *Patterson v. New York*, 432 U.S. 197, 207-08 (1977) (where the Court held that the Due Process Clause does not require state law to offer manslaughter as an alternative to murder, so *a fortiori* it did not require the state to disprove the manslaughter defense). The significance of these cases is that claims of error which pertain to affirmative defenses do not provide constitutional claims, because they pertain to matters beyond what the Court has hitherto said the Constitution requires.

Illinois was not required to allow the defense of voluntary manslaughter at all. *Patterson*, 432 U.S. at 207-08. Moreover, Illinois was free to allow such a defense while requiring the defendant to prove it. *Martin*, 480 U.S. at 233-34. Accordingly, it is not an unreasonable application of these principles to hold that jury instructions that create a reasonable likelihood the jury will not consider the defense do

not violate the Constitution. *Gilmore*, 113 S.Ct. at 2123 (O'Connor, J., concurring).

In sum, since Salazar's jury instructions did not deprive him of any constitutional right, his appellate counsel's failure to raise such instructional error on direct appeal did not result in the denial of a fair proceeding. Accordingly, the Illinois Supreme Court erred in concluding that Salazar was prejudiced by his counsel's failure to raise the issue.

II.

THIS COURT SHOULD GRANT CERTIORARI WHERE THE ILLINOIS SUPREME COURT EMPLOYED AN ERRONEOUS STANDARD FOR DETERMINING WHETHER SALAZAR WAS PREJUDICED AS A RESULT OF APPELLATE COUNSEL'S FAILURE TO RAISE *REDDICK* ERROR ON DIRECT APPEAL.

In addressing the prejudice component of Salazar's ineffective assistance of appellate counsel claim, the Illinois Supreme Court also committed a grievous error regarding the allocation of burdens. *Strickland v. Washington*, 466 U.S. 668 (1984) clearly sets forth that it is the defendant who bears the burden of establishing prejudice. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696. However, the Illinois Supreme Court improperly allocated this burden to the State.

Specifically, the court found that the State was unable to establish that counsel's failure to argue *Reddick* error on direct appeal was harmless beyond a reasonable doubt. *Salazar II,* 162 Ill. 2d at 522, 643 N.E.2d at 703. In other words, rather than placing the burden on Salazar to establish prejudice or, lack of harmless error, *(Strickland*, 466 U.S. at 696), the court effectively placed the burden on the

State to show that the *Reddick* error was harmless. Therefore, as the dissent noted, the majority employed an incorrect standard of review. *Salazar II*, 162 Ill. 2d at 536, 643 N.E.2d at 710 (Miller, J., dissenting).

Moreover, after concluding that appellate counsel's performance was deficient for failing to raise *Reddick* error on direct appeal, the majority stated that, "[i]n order to be granted a new trial because of *Reddick* error, defendant must show that his defense was prejudiced by the failure to follow *Reddick* at trial." *Id.*, 162 Ill. 2d at 522, 643 N.E.2d at 703. This statement further illustrates the majority's erroneous standard of review.

Defense counsel could have argued the *Reddick* issue on direct review, but failed to do so. Therefore, the only issue properly before the Illinois Supreme Court on review of the denial of post-conviction relief, was whether the defendant could show a reasonable probability that, because of appellate counsel's failure to raise *Reddick*, the result of his direct appeal was unreliable.

Also, in making its prejudice determination, the Illinois Supreme Court departed from its original findings of fact made on direct appeal. This departure is in contrast to the cautions of *Strickland*, where this Court stressed the importance of applying the appropriate standard in assessing whether prejudice resulted from counsel's errors. *Strickland*, 466 U.S. at 695. There the Court stated that the fact-finder's determination of whether prejudice had resulted must be limited to "the record of the proceeding under review" (*id.*), which in this case is the record of the direct appeal proceedings.

In the decision below, the majority concluded: "our review of the record reveals evidence which could have persuaded a properly instructed jury to find that the defendant had terminated his efforts to escape or avoid arrest by the offi-

cer, and that the defendant believed, perhaps unreasonably, that Officer Murrin was going to shoot him." *Salazar II*, 162 Ill. 2d at 524, 643 N.E.2d at 704. But this conclusion is in direct conflict with the court's findings on direct appeal, made in connection with its rejection of Salazar's argument that he lacked the requisite mental state to have been convicted of murder. On direct appeal, the court found that "[d]efendant's version of the struggle [was] not supported by the testimony at trial." *Salazar I*, 126 Ill. 2d at 452, 535 N.E.2d at 777. The court concluded that Salazar's "explanation that he gave up . . . because he was 'fenced in' [did] not coincide with his ability to vault fences immediately after the offense." *Id.*, 126 Ill. 2d at 450, 535 N.E.2d at 777. The court found that Salazar's version also failed to "agree with his later account that he surrendered only after the infliction of numerous blows to his face by the deceased. Salazar's testimony to the contrary reveals that he did not surrender at that time because he eventually struggled for and obtained the deceased's gun. . . . [E]ven in the light most favorable to defendant, the evidence shows that defendant, in his attempt to escape by vaulting the fence, was approached and stopped by Officer Murrin. At this point a struggle ensued and not any semblance of a surrender." *Id.*, 126 Ill. 2d at 450-51, 535 N.E.2d at 777.

Thus, the Illinois Supreme Court's decision on direct appeal clearly militated against a finding that Salazar had attempted to surrender because he was the recipient of a beating at the hands of the police officer. In fact, that court had concluded that ". . . Officer Murrin received the beating and not defendant." *Id.*, 126 Ill. 2d at 451, 535 N.E.2d at 777. The court found that the evidence of the injuries sustained by the officer, compared to the evidence showing that Salazar "left [the scene] basically unscathed," made it "apparent that defendant was the aggressor." *Id.* The court noted that it was significant that Willie Pitts and Officer

Ponce testified that the incident happened in only a matter of a few minutes, therefore ruling out the possibility of a drawn-out struggle as indicated by Salazar. *Id.*, 126 Ill. 2d at 452, 535 N.E.2d at 777. The court stated that ". . . even looking at the evidence most favorably to defendant, this court finds uncontroverted evidence presented at trial concerning defendant's conduct and the physical evidence reveals that defendant had the requisite mental state." *Id.*, 126 Ill. 2d at 450, 535 N.E.2d at 776.

The majority's decision below, that a properly instructed jury could have found that Salazar had terminated his efforts to escape or avoid arrest, *(Salazar II*, 162 Ill. 2d at 524, 643 N.E.2d at 704), conflicts with its original conclusion on direct appeal, that "defendant's version does not support the view that he was surrendering but, rather, that Salazar was exercising a ploy to catch the officer off guard in order to renew his escape with added vigor." *Salazar I*, 126 Ill. 2d at 453, 535 N.E.2d at 778.

The recasting of the facts in the decision below seems to support Salazar's theory of self-defense, but the Illinois Supreme Court was not at liberty to alter the factual findings it had made on direct appeal. Instead, the court should have examined the factual findings made on direct appeal and determined whether, in light of those findings, Salazar could show a reasonable probability that the result of his direct appeal was unreliable and in fact would have been different had appellate counsel raised *Reddick*. An examination of the court's findings on direct appeal, should have led to a conclusion below that Salazar was not prejudiced by counsel's failure to argue *Reddick* error on appeal. *See Salazar II*, 162 Ill. 2d at 539, 643 N.E.2d at 711 (Miller, J., dissenting) ("In its earlier opinion, this court affirmed the defendant's conviction for murder and rejected his contentions that he did not possess a mental state necessary for

murder, that he was acting in self-defense, and that he could be guilty of the lesser offenses of voluntary or involuntary manslaughter.") Those findings included noting that another police officer, who came upon Salazar immediately after the offense, "only observed that defendant was carrying a handgun and that defendant did not have any debris or blood on him." *Salazar I*, 126 Ill. 2d at 436, 535 N.E.2d at 770. The officer testified that at that time he "did not observe anything unusual about the right side of defendant's face." *Id.* And further, another witness, who had observed Salazar leaving the scene of the crime, testified that "the left side of defendant's face did not have any unusual markings, blood or bruises." *Salazar I*, 126 Ill. 2d at 437, 535 N.E.2d at 770.

Had the court below correctly allocated the burden and not departed from its earlier findings of fact made on direct appeal, the court would have concluded that Salazar was unable to show prejudice resulting from counsel's failure to argue *Reddick* error on appeal. *Strickland*, 466 U.S. at 694.

CONCLUSION

For the aforementioned reasons, Petitioner, the People of the State of Illinois, respectfully requests this Court to find that: (1) the Illinois Supreme Court's decision below conflicts with this Court's decision in *Lockhart v. Fretwell*, and (2) the Illinois Supreme Court's analysis under the *Strickland v. Washington* standard so conflicts with prior rulings of this Court as to compel the Court to grant Certiorari either by plenary consideration or summary reversal.

Respectfully submitted,

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APPENDIX

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APPENDIX A

162 Ill.2d 513

The PEOPLE of the State of Illinois, Appellee,
v.
Manuel SALAZAR, Appellant.
No. 73399.

Supreme Court of Illinois.
Sept. 22, 1994.
Rehearing Denied Dec. 5, 1994.

* * * * *

Justice McMORROW delivered the opinion of the court:

Following a jury trial in the circuit court of McLean County, defendant, Manuel Salazar, was found guilty of murdering an on-duty police officer. (Ill.Rev.Stat. 1983, ch. 38, pars. 9-1(a)(1), (b)(1).) The jury found that the defendant should be sentenced to death for this offense (Ill. Rev.Stat. 1983, ch. 38, par. 9-1(d)) and the trial court entered conviction and sentence in accordance with the jury's findings. On appeal, this court affirmed the defendant's conviction and sentence (*People v. Salazar* (1988), 126 Ill.2d 424, 129 Ill.Dec. 1, 535 N.E.2d 766). Defendant filed a petition for post-conviction relief alleging ineffective assistance of counsel. (725 ILCS 5/122-1 *et seq.* (West 1992).) Following an evidentiary hearing, the trial court denied defendant's request for post-conviction relief. Defendant appeals. 134 Ill.2d R. 651(a).

BACKGROUND

Defendant was prosecuted and convicted for the shooting death of Officer Martin Murrin that occurred on September 12, 1984, while the officer was allegedly attempting to arrest defendant on an outstanding felony warrant.

Defendant's defense at trial was that he shot the police officer in self-defense. This court's previous opinion contains a detailed statement of the evidence presented at defendant's trial. (See *Salazar*, 126 Ill.2d at 435-49, 129 Ill.Dec. 1, 535 N.E.2d 766.) We restate the evidence only to the extent necessary to resolve the issues presented in this appeal from the dismissal of defendant's post-conviction petition.

Evidence presented at defendant's trial showed that shortly before the date of the incident, Officer Murrin had seen a flyer indicating the defendant was "wanted" on an outstanding felony arrest warrant and that Officer Murrin told his partner that he "was going to find defendant." (*Salazar*, 126 Ill.2d at 436, 129 Ill.Dec. 1, 535 N.E. 2d 766.) As Officer Murrin and his partner were patrolling the vicinity in a marked police car, they passed a vehicle in which defendant was a passenger. They pursued the automobile, the car slowed, and defendant ran out of the car. Officer Murrin followed defendant on foot, with his gun drawn. See *Salazar*, 126 Ill.2d at 435-36, 129 Ill.Dec. 1, 535 N.E.2d 766.

When defendant ran from the officer, defendant was carrying a gym bag. Witnesses testified that they saw the officer follow the defendant into an alleyway. Shortly thereafter, they heard shots fired. Officer Murrin's partner found Officer Murrin in the alley. The officer had been shot five times. William Pitts testified that he saw Officer Murrin follow the defendant and heard the officer say to defendant, "Stop fighting, * * *. I got you. You are under arrest." (*Salazar*, 126 Ill.2d at 436-37, 129 Ill.Dec. 1, 535 N.E.2d 766.) Pitts testified that he then heard gunshots. Officer Robert Brenczewski, who had interviewed witnesses following the shooting, testified at defendant's trial. Officer Brenczewski testified that when he inter-

viewed Pitts after the incident, Pitts informed the officer that Pitts "heard a type of talking which he could not make out." *Salazar*, 126 Ill.2d at 437, 129 Ill.Dec. 1, 535 N.E.2d 766.

Defendant testified at his trial that he shot Officer Murrin in self-defense. According to his trial testimony, defendant ran into the alley and heard someone shout "Freeze." Defendant stated that he looked behind him and saw Officer Murrin. Defendant continued to run because he wanted to dispose of the gun in his gym bag. Defendant testified that he ran into an alley that was a dead-end, threw the gym bag away and raised his hands above his head. Defendant stated that Officer Murrin came up to the defendant and hit the defendant several times, causing defendant to fall to the ground. The officer then knelt on top of him and continued to hit the defendant several more times. Defendant stated that he told the officer several times, "I give. I give." However, Officer Murrin continued to hit the defendant. The defendant testified that he either pushed or punched the officer and the officer reached for his revolver. Defendant stated that he also reached for Officer Murrin's weapon. Defendant testified that they continued to struggle until the defendant fell backward. Defendant stated that the gun fired repeatedly when he fell. He testified that he ran away, jumped over a fence, and threw away the officer's revolver. See *Salazar*, 126 Ill.2d at 448, 129 Ill.Dec. 1, 535 N.E.2d 766.

Following the incident, police officers discovered defendant's gym bag near the scene. In the bag, the officers found various items including a pair of brass knuckles, a Smith and Wesson 9 millimeter semiautomatic gun, and two bullet clips. (See *Salazar*, 126 Ill.2d at 441, 129 Ill. Dec. 1, 535 N.E.2d 766.) Tests revealed that Officer Murrin's "left hand was on or near the muzzle of a firearm

when it discharged" and that his "right hand could have been on or near as it was discharged." (*Salazar*, 126 Ill. 2d at 440-41, 129 Ill.Dec. 1, 535 N.E.2d 766.) Forensic evidence indicated that the officer had suffered injuries "consistent with blunt trauma" including "abrasions or scrapes as well as bruising on the skin." *Salazar*, 126 Ill.2d at 442, 129 Ill.Dec. 1, 535 N.E.2d 766.

After the shooting, defendant ran from the scene to the home of the parents of Pedro Palacios, a friend of defendant, who lived nearby. Pedro testified that he encountered the defendant in the garage while defendant was putting on the clothes belonging to one of Pedro's brothers. Pedro stated at trial that he saw that "defendant's face was 'puffed up' on the right side" and that he had "a problem recognizing defendant at first." (*Salazar*, 126 Ill.2d at 438, 129 Ill.Dec. 1, 535 N.E.2d 766.) Pedro also stated that defendant told them that defendant had been chased by a police officer, and that although he had tried to surrender, the officer continued to hit defendant repeatedly. Pedro testified that the defendant said that when he could no longer tolerate the beating, he reached for the officer's gun and shot the officer.

The jury found defendant guilty of murder in the shooting death of Officer Murrin. The jury further determined that there was no mitigating evidence sufficient to preclude imposition of the death penalty. Defendant's conviction and sentence were affirmed on direct appeal (see *Salazar*, 126 Ill.2d 424, 129 Ill.Dec. 1, 535 N.E.2d 766).

In his petition for post-conviction relief, defendant alleged, *inter alia*, that his appellate counsel was ineffective for failing to raise certain arguments during defendant's direct appeal. Following an evidentiary hearing, the trial court denied defendant's post-conviction petition. He appeals to this court. 134 Ill.2d R. 651(a).

ANALYSIS

The defendant's first argument in support of his post-conviction petition relies on this court's decision in *People v. Reddick* (1988), 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141. In *Reddick*, this court held that the Illinois pattern jury instructions regarding murder and voluntary manslaughter, used by the trial court at the *Reddick* defendants' trials, incorrectly advised the jury that it was the State's burden to *prove* one of the mitigating mental states that would reduce murder to voluntary manslaughter. This court determined that the instructions should have told the jury that it was the State's burden to *disprove* the pertinent mitigating mental states. (*Reddick*, 123 Ill.2d at 193-97, 122 Ill.Dec. 1, 526 N.E.2d 141; see also *People v. Shields* (1991), 143 Ill.2d 435, 442, 159 Ill.Dec. 50, 575 N.E.2d 538.) In *Reddick*, this court explained the improper effect of the erroneous jury instructions on the jury's determination of the defendants' guilt:

> "The voluntary manslaughter instructions indicate that to obtain a voluntary manslaughter conviction the People must prove the existence of one of the alternative mitigating mental conditions which the People contend did not exist. By contrast, the murder instruction makes no mention of the mitigating mental conditions. These instructions essentially assure that, if the jury follows them, the jury cannot possibly convict a defendant of voluntary manslaughter. The reason is that even if a mitigating mental state is proved, it will have been proved by the defendant, not the People." *Reddick*, 123 Ill.2d at 194-95, 122 Ill. Dec. 1, 526 N.E.2d 141.

The jury instructions utilized by the trial court in the present case were the same as those found defective in *Reddick*. Notwithstanding this *Reddick* error, the State contends that the defendant is not entitled to post-con-

viction relief because any *Reddick* defect in the instructions used at defendant's jury trial was not of constitutional proportion. According to the State, a *Reddick* error in jury instructions does not amount to a violation of constitutional due process. To support this argument, the State relies on *Gilmore v. Taylor* (1993), 508 U.S. ____, 113 S.Ct. 2112, 124 L.Ed.2d 306.

We need not address the question of whether *Reddick* error is a constitutional violation in order to determine whether defendant is entitled to post-conviction relief. Defendant argues that because the jury instructions given in his trial violated the directives of *Reddick*, the defendant should receive a new trial. Defendant presents this argument in a petition for post-conviction relief. According to precedent of this court, an action filed under the Post-Conviction Hearing Act is a collateral attack on the defendant's conviction and sentence, not an appeal from that conviction and sentence. (*People v. Ruiz* (1989), 132 Ill.2d 1, 9, 138 Ill.Dec. 201, 547 N.E.2d 170.) The purpose of a post-conviction proceeding is to consider constitutional arguments that the defendant did not raise, and could not have raised, in his direct appeal. (*People v. Hall* (1993), 157 Ill.2d 324, 330, 193 Ill.Dec. 98, 626 N.E.2d 131; *People v. Owens* (1989), 129 Ill.2d 303, 307-08, 135 Ill.Dec. 780, 544 N.E.2d 276.) The record shows that this court's decision in *Reddick* was filed while defendant's direct appeal was pending before this court. As a result, defendant could have raised a *Reddick* argument in his direct appeal from his conviction and sentence. See *Shields*, 143 Ill.2d at 445, 159 Ill.Dec. 40, 575 N.E.2d 538.

Generally, the defendant's missed opportunity to raise the *Reddick* issue in his direct appeal could preclude this court's consideration of his *Reddick* argument in this post-conviction proceeding. However, defendant's *Reddick* ar-

gument is based upon an allegation that defendant was deprived of the effective assistance of counsel. This court has noted that it is appropriate, in a post-conviction proceeding, to address the merits of a defendant's claim that his appellate attorney was ineffective for failing to present certain arguments during the defendant's direct appeal. (*E.g., People v. Stewart* (1990), 141 Ill.2d 107, 152 Ill.Dec. 286, 565 N.E.2d 968.) For example, in *People v. Ruiz* (1989), 132 Ill.2d 1, 138 Ill.Dec. 201, 547 N.E.2d 170, this court observed:

> "An action for post-conviction relief represents a collateral attack on a prior judgment; it is not an appeal from the underlying conviction and sentence. [Citations.] To be entitled to post-conviction relief, a defendant must establish a substantial deprivation of Federal or State constitutional rights in the proceedings that produced the judgment under attack [citation]. Rulings on issues that were previously raised at trial and on direct appeal are *res judicata*, and issues that could have been raised in the original proceedings, but were not, will be deemed waived. [Citation.]
>
> The primary constitutional claim undergirding the defendant's arguments for post-conviction relief is that he was denied the effective assistance of counsel both at trial and on direct appeal. * * * The State responds that several of the issues pertaining to trial counsel's representation must be deemed waived because they were matters of record and therefore could have been raised on direct appeal. We have previously held, however, that counsel cannot be expected to argue his own incompetency [citation], and such a rule would be applicable here, where trial counsel hired the attorney who handled the appeal. Moreover, we note that the defendant has made the additional allegation that appellate counsel was ineffective for failing to raise the matters on direct appeal. The alleged ineffectiveness of appellate counsel

> will not operate as a bar to consideration of those issues. [Citation.]" *Ruiz*, 132 Ill.2d at 9-10, 138 Ill. Dec. 201, 547 N.E.2d 170.

In light of this precedent, we will consider defendant's *Reddick* argument in the context of defendant's assertion that his appellate counsel, who was also his trial attorney, was ineffective because the attorney failed to argue, in defendant's first direct appeal from his conviction, that there was reversible error in the jury instructions under this court's pronouncements in *Reddick*, 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141. Generally, ineffective assistance of counsel is found where the attorney's representation fell below an objectively reasonable standard of competence and where the deficiencies in counsel's representation prejudiced the defendant's defense at trial such that the defendant was deprived of a fundamentally fair trial. See, *e.g.*, *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Caballero* (1989), 126 Ill.2d 248, 269-70, 128 Ill.Dec. 1, 533 N.E.2d 1089.

As previously noted, it is undisputed in the present appeal that the jury instructions concerning murder and voluntary manslaughter given at defendant's trial were in violation of *Reddick*. The court's decision in *Reddick* was announced while defendant's direct appeal was pending before this court. Five months elapsed between the date on which the *Reddick* decision was filed and the announcement of the decision in defendant's direct appeal from his conviction and sentence. During this period, defendant's attorney did not file a motion requesting this court to consider whether there had been *Reddick* error at defendant's trial. At the hearing on defendant's post-conviction petition, defendant's appellate counsel could not account for or explain his failure to bring to this court's atten-

tion an allegation that *Reddick* error had occurred during defendant's trial. We conclude that the defendant's attorney was ineffective for his failure to raise a *Reddick* argument during defendant's direct appeal. See, *e.g.*, *People v. Logan* (1991), 224 Ill.App.3d 735, 166 Ill.Dec. 721, 586 N.E.2d 679 (appellate counsel's failure to raise meritorious issue on appeal deprived defendant of effective assistance of counsel).

Having determined that defendant was deprived of the effective assistance of counsel when his attorney failed to argue *Reddick* on direct appeal from defendant's criminal conviction, we turn to a determination of whether defendant should receive a new trial. A defendant is not automatically entitled to a new trial whenever there has been a *Reddick* violation, and an infraction of *Reddick* is not *per se* reversible error. In order to be awarded a new trial because of *Reddick* error, the defendant must show that his defense was prejudiced by the failure to follow *Reddick* at trial. (See, *e.g.*, *People v. Shields* (1991), 143 Ill.2d 435, 445, 159 Ill.Dec. 40, 575 N.E.2d 538.) The State contends that defendant was not prejudiced by his attorney's failure to raise the *Reddick* issue on direct appeal. The State argues that, because the evidence against the defendant was overwhelming, the failure of defendant's appellate counsel to raise a *Reddick* issue with respect to the jury instructions in the instant cause was harmless error beyond a reasonable doubt.

To support this argument, the State relies upon certain statements set forth in this court's opinion in defendant's direct appeal. Specifically, this court stated that the "defendant * * * was also a forcible felon at the time of the instant offense [and therefore] cannot claim a qualified right to meet excessive force with deadly force and it is defendant who must suffer the legal consequences

of his choice to kill." (*Salazar*, 126 Ill.2d at 467, 129 Ill. Dec. 1, 535 N.E.2d 766.) The State claims that in this quoted comment, this court "found that as a matter of law, defendant, a fleeing felon, was not entitled to assert self-defense." We disagree.

The statement appearing in this court's opinion, quoted by the State, appears in a paragraph in which this court found that the trial court did not abuse its discretion when it gave the jury certain nonpattern jury instructions. The trial court's instructions had advised the jury, in pertinent part, that if the jury found the defendant attacked the officer while he was attempting to evade arrest, the jury could reasonably conclude that the defendant was a fleeing felon, who could not claim a right to use deadly force in his own defense. Thus, the remarks of this court upon which the State now relies were made in reference to the propriety of instructions to guide the jury in the event that the jury found that the defendant was a fleeing felon at the time of the incident. See *Salazar*, 126 Ill. 2d at 465-67, 129 Ill.Dec. 1, 535 N.E.2d 766.

However, if the defendant terminated his efforts to escape and surrendered to the officer, then defendant was no longer a *fleeing* felon attempting to elude arrest by the police officer. The comments made by this court in defendant's direct appeal did not refer to the appropriate instructions to be applied by the jury in its determination of whether the defendant was or was not a fleeing felon at the time of the homicide. If the jury accepted the defendant's claim that he had surrendered to Officer Murrin, that thereafter the officer began to assault the defendant, and that the defendant believed, albeit unreasonably, that the force he used in defending himself was necessary to prevent his imminent death or great bodily harm to himself, the jury could have found the defendant

guilty of voluntary manslaughter. (See generally *People v. McGraw* (1958), 13 Ill.2d 249, 149 N.E.2d 100; *People v. Doody* (1931), 343 Ill. 194, 175 N.E. 436; *People v. Forte* (1915), 269 Ill. 505, 512, 110 N.E. 47; *People v. Smith* (1993), 242 Ill.App.3d 344, 347-48, 182 Ill.Dec. 323, 609 N.E.2d 857; *People v. Lyda* (1989), 190 Ill.App.3d 540, 545, 137 Ill.Dec. 405, 546 N.E.2d 29; *People v. Veatch* (1986), 145 Ill.App.3d 23, 29, 99 Ill.Dec. 227, 495 N.E.2d 674; *People v. Bailey* (1982), 108 Ill.App.3d 392, 398, 64 Ill.Dec. 75, 439 N.E.2d 4; *People v. Fort* (1970), 119 Ill.App.2d 350, 355, 256 N.E.2d 63; 720 ILCS Ann. 5/7-7, Committee Comments-1961, at 362 (Smith-Hurd 1993).) Consequently, this court's comments in defendant's direct appeal did not find, as a matter of law, that the defendant was a forcible felon who was fleeing arrest at the time of the offense, nor did those comments foreclose the giving of jury instructions on voluntary manslaughter.

The State contends that the evidence presented at defendant's jury trial showed the defendant was not justified in shooting Officer Murrin, because the defendant was attempting to escape arrest when the defendant began to attack the officer. However, our review of the record reveals evidence which could have persuaded a properly instructed jury to find that the defendant had terminated his efforts to escape or avoid arrest by the officer, and that the defendant believed, perhaps unreasonably, that Officer Murrin was going to shoot him. Defendant's trial testimony indicated that the defendant shot the officer during the course of a struggle with the officer that started after the defendant attempted to surrender to the officer and the officer began to assault the defendant. Other evidence tended to corroborate defendant's version of the occurrence. For example, Pedro Palacios testified that when he saw defendant shortly after the incident,

defendant's face was swollen and difficult to recognize. Pedro also stated at trial that defendant told him defendant had been chased by a police officer with whom defendant had a struggle. According to Pedro's trial testimony, defendant said that he shot the officer after defendant surrendered because the officer had beaten the defendant and defendant believed Officer Murrin was going to shoot him. Tests revealed that at least one of Officer Murrin's hands was on his revolver when it was discharged, and medical evidence showed that the officer had suffered injuries which indicated a recent struggle. Forensic evidence also indicated the shots were fired from very close range.

The State asserts that the defendant's version of the incident was "contradicted by the other evidence at trial in such a fashion as to render defendant's version that he acted in self-defense highly improbable." However, it was the province of the jury to determine whether defendant's explanation of the shooting was "highly improbable."

The State points out that defendant shot Officer Murrin five times at close range and that the officer suffered bruises and abrasions as a result of his struggle with defendant. As we determined in defendant's direct appeal from his conviction, the State's evidence, when coupled with all of the other evidence presented at trial, was sufficient for the jury to find, beyond a reasonable doubt, that the defendant was guilty of murder. (*Salazar*, 126 Ill. 2d at 435-54, 129 Ill.Dec. 1, 535 N.E.2d 766.) The determination of the defendant's guilt was made by the jury, however, not by this court upon review. In order to make that determination, the jury was entitled to accurate instructions that properly advised the jury of the State's

burden consistent with *Reddick*. The jury instructions in the present case did not accurately advise the jury of the State's burden to disprove the defendant's affirmative defense in accordance with *Reddick*. The defendant's account of the incident, the testimony of other witnesses regarding the shooting, and the testimony regarding the physical condition of the defendant and Officer Murrin following the altercation could have persuaded properly instructed jurors to conclude that defendant was guilty of voluntary manslaughter, rather than murder. Whether the defendant should be found guilty of murder or manslaughter must be resolved by a properly instructed jury at a new trial on remand of the present cause.

The State argues that it is significant the jury did not return verdicts on both voluntary manslaughter and murder, as did the jury in *People v. Mikell* (1991), 217 Ill.App.3d 814, 160 Ill.Dec. 729, 577 N.E.2d 1300. The State argues that it is also significant that the jury in the present cause imposed the death penalty for the defendant's murder conviction. We do not believe that the jury's failure to return inconsistent verdicts, or the jury's decision to impose the death penalty, demonstrates that the jury would have found the defendant guilty of murder even if the jury had been properly instructed under *Reddick*.

In light of this disposition, we need not and do not address the parties' remaining arguments with respect to defendant's request for post-conviction relief. For the reasons stated, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

Chief Justice BILANDIC, concurring:

The majority concludes that the defendant's conviction must be reversed and the cause remanded for a new trial because the defendant was deprived of the effective assistance of counsel when his attorney on direct appeal failed to challenge the voluntary manslaughter and murder instructions given at trial.

I concur with the majority's disposition of this appeal. I write separately for two reasons: first, to clarify the standard of review applicable in this appeal; and second, to distance myself from several statements in the majority opinion which, I believe, improperly suggest that the defendant was somehow victimized by Officer Murrin.

As stated, the defendant claims that he was deprived of the effective assistance of counsel on direct appeal because his counsel failed to challenge on direct appeal, certain jury instructions that this court condemned in *People v. Reddick* (1988), 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141. Claims of ineffective assistance of counsel are evaluated under the two-part standard set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under that standard, the defendant here must prove, first, that his counsel was incompetent in failing to raise the *Reddick* error, and second, that he suffered prejudice because of counsel's failure to raise the *Reddick* error on direct appeal.

I concur with the majority's finding that the defendant has satisfied the first prong of the *Strickland* standard. The real question in this appeal is whether the defendant has satisfied the second or "prejudice" prong of the *Strickland* standard. Under this prong, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceed-

ing would have been different." (*Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.) The defendant here claims that he was prejudiced by his attorney's failure to raise the *Reddick* error on direct appeal, because this court would have reversed his conviction and granted him a new trial if the error had been called to its attention.

In this regard, the majority appropriately notes that this court has specifically rejected the contention that every *Reddick* error necessitates an outright reversal of a defendant's conviction and remandment for a new trial. In *People v. Shields* (1991), 143 Ill.2d 435, 445, 159 Ill.Dec. 40, 575 N.E.2d 538, this court stated:

> "[W]e reject the defendants' contention that the *Reddick* court's description of the errors identified in that decision as 'grave' (see *Reddick*, 123 Ill.2d at 198 [122 Ill.Dec. 1, 526 N.E.2d 141]) mandates automatic reversal of convictions arising from trials in which the defective jury instructions were used. *Reddick* itself counseled that the entire record must be examined in determining whether the jury was properly instructed. (*Reddick*, 123 Ill.2d at 198 [122 Ill.Dec. 1, 526 N.E.2d 141.]) Moreover, our subsequent decisions have recognized that the errors identified in *Reddick* may indeed be harmless in appropriate cases. See *People v. Austin* (1989), 133 Ill.2d 118, 123-24 [139 Ill.Dec. 819, 549 N.E.2d 331;] *People v. Harris* (1989), 132 Ill.2d 366, 395 [138 Ill.Dec. 620, 547 N.E.2d 1241.]"

Thus, under *Shields*, an instructional error that violates *Reddick* necessitates reversal of a defendant's conviction and the grant of a new trial only when the reviewing court determines, in light of *all of the evidence in the record*, that the improper instructions were not harmless error. *People v. Shields* (1991), 143 Ill.2d 435, 159 Ill.Dec. 40, 575 N.E.2d 538.

The majority concludes that the improper jury instructions were not harmless error and that, therefore, the defendant was prejudiced by appellate counsel's failure to raise the *Reddick* error on direct appeal. While I concur with the majority's conclusion that the *Reddick* error was not harmless (and that the defendant was therefore prejudiced by appellate counsel's failure to raise the *Reddick* issue), I strongly disagree with the majority's misleading portrayal of the evidence produced at trial. In its analysis, the majority states that the "record reveals evidence which could have persuaded a properly instructed jury to find that the defendant had terminated his efforts to escape or avoid arrest by the officer, and that the defendant believed, perhaps unreasonably, that Officer Murrin was going to shoot him." (162 Ill.2d at 524, ____ Ill. Dec. at ____, 643 N.E.2d at 704.) The majority opinion then goes on to present a one-sided view of the evidence introduced at trial, relying almost exclusively upon the defendant's own trial testimony. Upon reading the majority opinion, one is left with the impression that the defendant initially fled the officer but then experienced a sudden change of heart, stopped on his own initiative, surrendered, and was thereupon severely beaten by Officer Murrin, feared for his life, and then shot and killed the officer, believing such force was necessary and justified.

For the record, I wish to point out that the evidence produced at trial and thoroughly discussed by this court in its opinion on direct appeal presents an entirely different picture of the incident in question. (See *People v. Salazar* (1988), 126 Ill.2d 424, 129 Ill.Dec. 1, 535 N.E.2d 766.) In fact, the evidence established that at the time of the shooting, the defendant had a strong motive to elude arrest, as there was an outstanding warrant for his arrest, charging him with aggravated battery, a felony.

The evidence also suggested that the defendant knew of the outstanding warrant, because the defendant had made plans prior to the shooting to leave the country and flee to Mexico. The evidence also established that the defendant was trained in both boxing and in martial arts.

The evidence at trial established that the victim, Officer Murrin, was shot with his own gun. The State introduced the testimony of a witness who saw Officer Murrin chasing the defendant and overheard the scuffle between the defendant and the officer. The witness testified that he saw a young Hispanic man running down the alley with a police officer in pursuit. The police officer was carrying a gun in his right hand. A few seconds later, he heard someone say, "Stop fighting, damn it. I got you. You are under arrest." The witness then heard three quick gunshots followed by a pause and two more gunshots. The witness then saw the defendant vault a fence while holding the gun in his right hand, and then come back over the fence without the gun. The witness testified that the defendant's face did not have any unusual markings, bruises or blood on it.

A neutron activation analysis revealed that Officer Murrin's left hand was on or near the muzzle of the gun when it discharged and that the officer's right hand could have been on or near the gun when it discharged.

The victim's partner, Officer Ponce, testified that he heard five gunshots and then saw the defendant in the rear of a residence holding a gun at a 45-degree angle. Ponce yelled, "Halt, police." The defendant looked over his right shoulder and then ran off. Ponce observed that the defendant did not have any debris or blood on him and did not observe anything unusual about the right side of the defendant's face.

An autopsy revealed that the victim had fresh bruises and abrasions on his right upper lip, a prominent scratch behind the right ear, scrapes and scratches on his left upper arm, on the back of his left arm and on his left forearm. The victim also had abrasions on the right upper arm, on the back of the right elbow, and on the front and back of his neck. Scratches were also found on the victim's right knee and the back of the left knee.

The autopsy also revealed that the victim had been shot five times: three times in the chest, once in the right ear and once in the center of his forehead. A forensic pathologist testified that the chest wounds were probably inflicted first because they produced a great deal of internal bleeding. The wound in the center of the forehead was inflicted later, because it was instantaneously fatal and would have prohibited the victim from producing significant internal bleeding. A forensic scientist testified that two of the chest wounds were inflicted from a distance of less than one inch, while the third chest wound was caused by a gunshot fired four to six feet from the victim.

This court, on direct appeal, reviewed this evidence, along with the evidence discussed in the majority opinion. In affirming the defendant's murder conviction, this court found that the evidence established that the defendant did not surrender to Officer Murrin, but instead, initiated a struggle in an attempt to prevent his arrest. This court found that the evidence showed that the defendant was the initial aggressor and the dominant figure in the struggle. This court also found that Officer Murrin received a beating in the struggle, while the defendant was left basically unscathed. (*Salazar*, 126 Ill.2d at 451, 129 Ill.Dec. 1, 535 N.E.2d 766.) This court also noted that the defendant shot the officer, not once, but *five* times at close range, and then immediately fled the scene and, ultimate-

ly, the country. In light of this evidence, this court concluded that the "defendant did not act with any unreasonable belief that would justify his taking of the deceased's weapon and shooting the victim five times at very close range. * * * Except for defendant's testimony, nothing in the record reveals that he acted in any other way but deliberately and intentionally to kill Officer Murrin." *Salazar*, 126 Ill.2d at 453-54, 129 Ill.Dec. 1, 535 N.E.2d 766.

As one can see from the discussion of the trial evidence above, the majority's statement that the record reveals evidence that "could have persuaded" a properly instructed jury to find the defendant guilty of voluntary manslaughter is misleading and one-sided, especially when one considers that most of this evidence was the defendant's own trial testimony. While I find fault with the majority's presentation of the evidence, I do agree that the defendant in this case presented some evidence of an unreasonable belief that deadly force was necessary. Therefore, it cannot be said that the *Reddick* error was harmless beyond a reasonable doubt.

Although *Reddick* was decided in June 1988, five months prior to the decision in the original appeal in this case, defendant's appellate counsel did not cite *Reddick* in that appeal. *Reddick* was a significant opinion in the field of criminal law. Defendant's appellate counsel was not even aware of its existence. Had he been aware of *Reddick* and cited it, this court probably would have granted a new trial as it did in similar cases at that time. (See, *e.g.*, *Shields*, 143 Ill.2d at 447, 449, 452, 159 Ill.Dec. 40, 575 N.E.2d 538 (reversal and remandment required where it is not clear beyond a reasonable doubt that *Reddick* error was harmless).) In addition, the prosecution remained silent on the *Reddick* issue and this court did not raise it *sua sponte*. All of these circumstances persuade me to

give the defendant a new trial. The facts of this case, however, are unique. Our holding here is not intended to diminish in any way our holding in *Shields*. In order to prevail, a defendant still must establish that a *Reddick* error was not harmless error. *Shields*, 143 Ill.2d at 445, 159 Ill.Dec. 40, 575 N.E.2d 538.

For the reasons stated, I concur with the judgment of the majority.

HEIPLE, J., joins in this concurrence.

Justice MILLER, dissenting:

Unlike the majority, I would not grant the defendant relief on his post-conviction claim regarding the jury instructions used at trial for the offenses of murder and voluntary manslaughter. The judge in the proceedings below properly rejected this argument following an evidentiary hearing on the allegations of the defendant's post-conviction petition, and I would uphold that determination.

Properly framed, the pertinent question in the present case is whether the defendant was denied the effective assistance of counsel by his attorney's failure to raise, on direct appeal before this court, any challenge to the jury instructions used in this capital case to instruct the jury on murder and voluntary manslaughter. The same attorney represented the defendant both at trial and on appeal; he was assisted by a different attorney each time. While the defendant's direct appeal was pending before this court, this court held, in *People v. Reddick* (1988), 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141, that the then-existing jury instructions for the offenses of murder and voluntary manslaughter failed to properly assign the burden of establishing the mitigation necessary for a conviction on the less serious offense. The court decided the

present defendant's appeal about five months after the decision in *Reddick*. At no time did counsel for the present defendant raise the *Reddick* issue or ask the court to reconsider the defendant's appeal, while it was pending in this court, in light of the earlier holding in *Reddick*.

The majority initially concludes that the defendant received ineffective assistance of counsel because of his attorney's failure to raise the *Reddick* issue on appeal from the judgment of conviction. (162 Ill.2d at 521-22, ____ Ill. Dec. at ____, 643 N.E.2d at 702-703.) After reaching that conclusion, however, the majority goes on to address what it apparently believes is a distinct issue in the case. The majority phrases this separate, additional question as whether the defendant must be granted a new trial because of the *Reddick* violation. (162 Ill.2d at 522, ____ Ill.Dec. at ____, 643 N.E.2d at 703.) In the discussion that follows, I will examine first the difficulties of this latter question, and I will then consider the merits of the defendant's ineffective-assistance claim.

I

A defendant is not entitled to a new trial even on grounds of constitutional error if it can be said that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.) In determining whether the present defendant is entitled to a new trial because of *Reddick* error, the majority's discussion accepts without question the State's assumption that a *Reddick* violation is constitutional in nature and hence subject to the *Chapman* test.

I realize, of course, that both this court and the United States Court of Appeals for the Seventh Circuit have

characterized various errors in the former jury instructions for murder and voluntary manslaughter as constitutional in nature. (See *Flowers v. Illinois Department of Corrections* (7th Cir. 1992), 962 F.2d 703; *Taylor v. Gilmore* (7th Cir. 1992), 954 F.2d 441, *rev'd* (1993), 508 U.S. ____, 113 S.Ct. 2112, 124 L.Ed.2d 306; *United States ex rel. Fleming v. Huch* (7th Cir. 1991), 924 F.2d 679; *Rose v. Lane* (7th Cir. 1990), 910 F.2d 400; *Falconer v. Lane* (7th Cir. 1990), 905 F.2d 1129; *People v. Shields* (1991), 143 Ill.2d 435, 159 Ill.Dec. 40, 575 N.E.2d 538; *People v. Flowers* (1990), 138 Ill.2d 218, 149 Ill.Dec. 304, 561 N.E.2d 674.) The time might be ripe to reexamine this issue, however, in light of a number of recent opinions on this subject by the Seventh Circuit, as well as one by the United States Supreme Court.

A close examination of *Reddick* reveals that the opinion "reads like a statutory decision." (*Flowers v. Illinois Department of Corrections*, 962 F.2d at 708 (Easterbrook, J., concurring).) Although the court in *Reddick* characterized the problem with the pattern jury instructions as "grave error" (*Reddick*, 123 Ill.2d at 198, 122 Ill.Dec. 1, 526 N.E.2d 141), the court did not describe the error as constitutional in origin or effect. Only once in the *Reddick* opinion does the word "constitutional" appear—and then in the course of the court's conclusion that the prosecution is not required to present evidence of a mitigating mental state to sustain a conviction for voluntary manslaughter. *Reddick*, 123 Ill.2d at 195, 122 Ill.Dec. 1, 526 N.E.2d 141 ("we further recognize the long-established constitutional, common law and statutory principle that, to sustain a conviction, the People must prove beyond a reasonable doubt every element of an asserted crime").

In concluding that the then-current pattern jury instructions on murder and voluntary manslaughter misallocated

the burden of proof, *Reddick* relied not on the United States or Illinois Constitution, but on section 3-2 of the Criminal Code of 1961 (Ill.Rev.Stat. 1985, ch. 38, par. 3-2), which governs affirmative defenses. Under that provision, the defendant must present "some evidence" to raise an affirmative defense; if an affirmative defense other than insanity is properly raised, the burden then falls on the prosecution to disprove it.

The *Reddick* court noted that section 3-2 was silent on what issues should be regarded as affirmative defenses in homicide trials, but the court nonetheless found that the legislature must have intended for that statute to apply to the mitigating mental states at issue in voluntary manslaughter. (*Reddick*, 123 Ill.2d at 195-97, 122 Ill.Dec. 1, 526 N.E.2d 141.) The court based this decision on its reading of the language of section 3-2 and on the legislative history of that provision. The court concluded:

> "Thus, under the 1961 Code, if a defendant in a murder trial presents sufficient evidence to raise issues which would reduce the charge of murder to voluntary manslaughter, then to sustain the murder conviction, the People must prove beyond a reasonable doubt that those defenses are meritless, and must also prove beyond a reasonable doubt the statutory elements of murder.
>
> The burden-of-proof instructions regarding both voluntary manslaughter and murder in both of these cases were thus incorrect in placing upon the People the burden of proving the existence of intense passion or unreasonable belief in justification. The instructions should have placed upon the People the burden of disproving the existence of either of these two states of mind." *Reddick*, 123 Ill.2d at 197, 122 Ill.Dec. 1, 526 N.E.2d 141.

In reexamining this question, the Seventh Circuit stated, in *Taylor v. Gilmore* (7th Cir. 1992), 954 F.2d 441, 449, *rev'd on other grounds* (1993), 508 U.S. ____, 113 S.Ct. 2112, 124 L.Ed.2d 306, "*Reddick*, therefore, does not rest upon federal due process principles, but rather is controlled solely by the Illinois Criminal Code * * *. Any indications to the contrary in our prior decisions are disavowed." Just as the instructional defect found by *Reddick* does not establish a violation of the United States Constitution and thus would not by itself form the basis for Federal *habeas* relief (*Estelle v. McGuire* (1991), 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385), the same defect should not present an independent ground for relief under the Illinois Post-Conviction Hearing Act, which provides a forum only for allegations of constitutional error, Federal or State. 725 ILCS 5/122-1 through 122-7 (West 1992); *People v. Hall* (1993), 157 Ill.2d 324, 330-31, 193 Ill.Dec. 98, 626 N.E.2d 131; *People v. Enoch* (1991), 146 Ill.2d 44, 50, 165 Ill.Dec. 719, 585 N.E.2d 115.

The Supreme Court's recent decision in *Gilmore v. Taylor* (1993), 508 U.S. ____, 113 S.Ct. 2112, 124 L.Ed.2d 306, is not to the contrary. In that case, the court considered the holding of the Seventh Circuit that the Illinois jury instructions used for murder and voluntary manslaughter violated due process because they could allow the jury to return a verdict of murder without having considered whether the defendant was guilty of voluntary manslaughter instead. In concluding that such a decision would be deemed to have announced a "new rule" that could not be given retroactive effect, the Supreme Court rejected the defendant's argument that existing constitutional precedent had dictated the circuit court's ruling. To the same effect here, if the rule in *Reddick* is also not dictated by existing constitutional precedent, one may wonder whether it is constitutionally based at all.

Even if it is granted that *Reddick* violations are constitutional in nature, the majority is using an incorrect standard of review when it simply asks whether the violation in this case was harmless beyond a reasonable doubt. (162 Ill.2d at 522, ____ Ill.Dec. at ____, 643 N.E.2d at 703.) What this analysis forgets is the manner in which the issue comes before us for review.

This is not a direct appeal from a judgment of conviction, but instead an appeal in a post-conviction proceeding. The Post-Conviction Hearing Act provides an offender with the opportunity to challenge his conviction and sentence for violations of Federal and State constitutional rights. (725 ILCS 5/122-1 through 122-7 (West 1992).) "The function of a post-conviction proceeding is not to relitigate the defendant's guilt or innocence but to determine whether he was denied constitutional rights. [Citation.]" (*People v. Shaw* (1971), 49 Ill.2d 309, 311, 273 N.E.2d 816.) Considerations of *res judicata* and waiver limit the scope of post-conviction review "to constitutional matters which have not been, and could not have been, previously adjudicated." (*People v. Winsett* (1992), 153 Ill.2d 335, 346, 180 Ill.Dec. 109, 606 N.E.2d 1186.) Accordingly, a post-conviction court will not ordinarily consider issues that were previously raised in the appeal from the underlying judgment of conviction, nor will it consider issues that could have been raised on appeal but were not. *People v. Collins* (1992), 153 Ill.2d 130, 135, 180 Ill.Dec. 60, 606 N.E.2d 1137; *People v. Ruiz* (1989), 132 Ill.2d 1, 9, 138 Ill.Dec. 201, 547 N.E.2d 170.

Because defense counsel could have argued the *Reddick* issue on direct review but failed to do so, the only proper question in this case, a collateral challenge to the defendant's convictions, is whether counsel was constitutionally ineffective for failing to raise that issue. Under *Strick-*

land v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, a defendant cannot prevail on an ineffective-assistance claim unless he establishes that he was prejudiced by a deficiency in counsel's performance.

The *Strickland* standard for judging claims of ineffective assistance of counsel differs in several important respects from the test of *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, for assessing the harmlessness of constitutional errors. Under *Strickland*, the burden properly falls on the defense rather than the prosecution, and the defendant must show both that counsel was professionally deficient and that he was prejudiced as a consequence of counsel's performance. In contrast, *Chapman* requires the State to establish the harmlessness of the constitutional error beyond a reasonable doubt.

The differences between these two standards are substantial. As the Supreme Court has explained, the outcome under the sixth amendment ineffectiveness inquiry will not always be the same as the outcome under the standard appropriate to the underlying substantive claim. (*Kimmelman v. Morrison* (1986), 477 U.S. 365, 380-82, 106 S.Ct. 2574, 2586-87, 91 L.Ed.2d 305, 323-24.) Discussing this question in the fourth amendment context, the Court has stated:

> "As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding. More importantly, it differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their

> attorneys will be granted the writ and will be entitled to retrial without the challenged evidence." *Morrison*, 477 U.S. at 382, 106 S.Ct. at 2586-87, 91 L.Ed.2d at 323-24.

Indeed, the substantial differences between the *Strickland* test and other standards of review remove any incentive for defense counsel to "sandbag," or to deliberately withhold the presentation of an argument at trial or on direct appeal in the hope or expectation of later achieving a favorable result under the guise of an ineffective-assistance claim. As the *Morrison* Court explained, again in relation to the fourth amendment issue involved there:

> "[W]hen an attorney chooses to default a Fourth Amendment claim, he * * * loses the opportunity to obtain direct review under the harmless-error standard of *Chapman v. California* [citation], which requires the State to prove that the defendant was not prejudiced by the error. By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted." *Morrison*, 477 U.S. at 382 n. 7, 106 S.Ct. at 2587 n. 7, 91 L.Ed.2d at 324 n. 7.

What the *Morrison* Court stated in the fourth amendment context is equally relevant here. The present defendant's challenge to the jury instructions used in his case must be evaluated through the sixth amendment lens provided by *Strickland*, rather than under *Chapman*'s harmless-error test, assuming the latter standard applies to our consideration on direct appeal, of a *Reddick* violation.

II

I need not repeat here the prudential concerns that mandate application of the *Strickland* test to the present defendant's claim, and the principles of law that guide our

resolution of this constitutional question are well settled. Under *Strickland*, a defendant who raises a claim of ineffective assistance of counsel must show both that counsel was deficient and that counsel's deficiency was prejudicial to the defendant. If no prejudice ensued from counsel's representation, a court may dispose of the ineffectiveness claim on that ground alone, without considering separately whether counsel was deficient for the reason alleged by the defendant. (*Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.) Contrary to the majority's determination, the record here establishes that the defendant was not prejudiced by counsel's failure on appeal to argue *Reddick* error.

The circuit judge in the proceedings below granted the defendant an evidentiary hearing on his post-conviction petition. Following a lengthy and exhaustive hearing, the judge denied the petition. With respect to the *Reddick* claim, the judge specifically found that defense counsel was not ineffective in failing to raise the *Reddick* issue on direct review. The judge believed that the evidence was not such that the defendant would have been found guilty of the less serious offense of voluntary manslaughter even if jury instructions satisfying the concerns of *Reddick* had been used at trial. More generally, the judge found that it was highly unlikely that a reasonable jury could have reached a different result in this case, and that the defendant's testimony was so contradicted by the other evidence that his claim of self-defense was highly improbable. It is clear that the post-conviction judge did not believe that the defendant had made the requisite showing of prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.) I see no

reason to depart from this assessment by the circuit judge, who carefully considered the allegations in the defendant's post-conviction petition, the evidence introduced at trial, and the testimony presented by the parties at the post-conviction hearing.

The conclusions reached by the post-conviction judge are consistent with this court's own findings on direct appeal—findings that the majority now ignores. In its earlier opinion, this court affirmed the defendant's conviction for murder and rejected his contentions that he did not possess a mental state necessary for murder, that he was acting in self-defense, and that he could be guilty only of the lesser offenses of voluntary or involuntary manslaughter. Although the court was not asked at that time to consider application of the *Reddick* decision to the defendant's case, its findings on direct appeal are clearly relevant here.

As was stated in the earlier opinion, the trial evidence showed that the defendant was a fleeing felon at the time of the attempted arrest, that the entire incident was brief, lasting only a few minutes, and that the defendant shot the police officer five times during that period. This court concluded then that the officer received the brunt of the beating, while the defendant escaped "basically unscathed." (*Salazar*, 126 Ill.2d at 451, 129 Ill.Dec. 1, 535 N.E.2d 766.) In addition, the court rejected the defendant's contention that the officer initiated the fight, and found instead that the defendant was the aggressor and, moreover, was the dominant figure in the battle. *Salazar*, 126 Ill.2d at 450-54, 129 Ill.Dec. 1, 535 N.E.2d 766.

On this record, I do not believe that it can be said that the defendant was prejudiced by his attorney's failure to raise the *Reddick* issue on appeal from the judgment of

conviction. This court's earlier findings demonstrate that reversal for a new trial would not have been warranted, even if counsel on appeal had argued *Reddick* error; by the same token, the outcome of the original trial was not made unreliable by counsel's failure to press the same contention at that earlier level.

For the reasons stated, I do not agree with the majority's conclusion that defense counsel was ineffective for failing to raise the *Reddick* issue in the original appeal, and I would consider here the remaining issues asserted by the defendant in this post-conviction proceeding.

APPENDIX B

(No. 62795.—Affirmed.)
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. MANUEL SALAZAR, Appellant.

Opinion filed November 21, 1988.—Rehearing denied April 3, 1989.

* * * * *

JUSTICE CUNNINGHAM delivered the opinion of the court:

On April 10, 1985, a bill of indictment was filed charging defendant, Manuel Salazar, with the murder of a police officer, Martin Murrin, while Officer Murrin was in the course of performing his official duties on September 12, 1984. (Ill. Rev. Stat. 1983, ch. 38, pars. 9—1(a)(1), (b)(1).) Subsequent to a change of venue from Will County to McLean County, a jury found defendant guilty of murder. Pursuant to section 9—1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1983, ch. 38, par. 9—1) (hereafter referred to as the death penalty statute), a death penalty hearing was held before the same jury (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(d)(1)). The jury unanimously found that defendant had attained the age of 18 or more, that statutory aggravating factors existed and that no mitigating factors existed to preclude the imposition of the death sentence. Defendant was sentenced to death. The sentence was stayed pursuant to Supreme Court Rule 609(a) pending appeal to this court (Ill. Const. 1970, art. VI, §4(b); 107 Ill. 2d Rules 609(a), 603). This court will address in full all the evidence in this case as it applies to each issue.

I

Defendant argues that he was denied equal protection of the law when the circuit court transferred the cause from Will County to McLean County, resulting in the alleged exclusion of blacks and persons of Spanish origin from the jury venire. Citing *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692, defendant specifically argues that he is entitled to an impartial jury drawn from a cross-section of the community.

In *Taylor*, the United States Supreme Court held that the systematic exclusion of women from sitting on juries violates a defendant's sixth amendment right to have a jury chosen from a fair cross-section of the community. In this case, however, defendant's argument does not involve whether a systematic exclusion of a particular race or ethnic group has occurred, but in actuality whether a lack of a jury chosen from a fair cross-section of a community equal to the community where the crime was committed and from whence this cause was transferred has denied defendant equal protection. This court effectively addressed the issue in *People v. Johnson* (1986), 114 Ill. 2d 170. This court held:

> "This is not a case involving the systematic exclusion of 'a "distinctive" group in the community' [citation], which would trigger a fair-cross-section inquiry under the standard recently announced by the Supreme Court in *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. Nor are we familiar with any constitutional right allowing a defendant to select his own place of trial. [Citation.] To require that the venire of the transferee county proportionately mirror any distinctive groups found in the originating county would either saddle our judiciary with an onerous, if not impossible, task or effectively grant defendants a heretofore unrecognized right to choose their place of trial." 114 Ill. 2d at 180-81.

The facts in this case are similar to those in *Johnson*. Defendant in this case was indicted in the circuit court of the Twelfth Judicial Circuit, Will County. On July 29, 1985, the People raised the issue of change of venue because in previous conversations with defendant's out-of-State counsel, the People were under the impression that defense counsel thought that the case had been transferred from Will County to Kankakee County as a matter of law. However, the People had not received any motion regarding the matter. The local defense counsel confirmed the People's statements. The trial court at this point stated that it did not know if the case would be transferred to Kankakee County because it did not believe that the "climate" would be beneficial to defendant based on previous experiences in that county. The court later expressed concern about transferring the case to Kankakee or Iroquois County and suggested the possibility of Rockford or "someplace like that." Local counsel agreed.

On August 2, 1985, the local defense counsel officially gave notice to the court and the People that it would be filing a motion to change venue in three weeks. Defendant filed his motion for change of venue on August 29, 1985, and on the same date the court held a hearing on the motion. The court granted defendant's motion but reserved its ruling regarding the naming of the situs of the trial. The court also expressed some reservations regarding other areas within the circuit and stated that it would confer with the chief judge regarding the arrangements. Defense counsel expressed no objections to Cook County, but the court stated that it would not be Cook County and possibly would be Peoria or Bloomington or "something like that."

On September 17, 1985, the court filed its written orders transferring the case from Will County to McLean

County for trial commencing on November 4, 1985. At the October 18 hearing, the out-of-State defense counsel expressed concern regarding the place of venue because of his need to be near an airport in light of the fact that he was coming from California. The court assured him that Bloomington in McLean County had a substantial airport. Defense counsel stated that if he had any more objections to venue he would submit a written motion. Defense counsel then expressed concern over the selection of jurors in McLean County. The court noted that it had filed its order for change of venue on September 12, 1985, and that defense counsel had waited until October 18, 1985, to express concern. The court told defense counsel that the motion had to be filed very soon because five weeks had passed.

On November 4, 1985, the date of the start of the trial, defense counsel filed a motion to discharge the jury and transfer this case to another county because .82% of the McLean County population is of Hispanic origin and 5% is of black and Hispanic origin, whereas the county of the incident is 4% of Hispanic origin and 14% of black and Hispanic origin. Defendant alleged that Spanish and black persons were being systematically excluded from the available jury pool. Prior to jury selection the court held a hearing on the motion. The trial court denied defense counsel's motion.

This court finds that defense counsel was attempting to force the circuit court to pick a venue favorable to defendant or to defendant's liking. This court does not recognize a right on behalf of a defendant to choose venue. As illustrated in this case, a defendant could continue to object to venue until a favorable situs has been found. The circuit court has discretion to choose the proper venue, and this court finds that the court did not abuse its discretion. The circuit court considered the amount of pretrial publicity, the other counties in the cir-

cuit, and the out-of-State defense counsel's concern for an airport and appropriately chose McLean County. Thus, this court finds that the circuit court did not abuse its discretion.

II

Defendant argues that the People failed to prove beyond a reasonable doubt defendant's guilt. Defendant specifically argues that the People failed to prove that defendant had the requisite mental state, *i.e.*, that he intentionally killed Officer Murrin. The evidence reveals otherwise.

Officer Thomas Ponce stated that on September 12, 1984, at approximately 5 p.m., he and the deceased were patrolling in full uniform in the northeast section of Joliet. They were traveling in a marked police squad car. As they were traveling eastbound on Woodruff Avenue and were approaching the intersection of Draper Avenue, they observed a green, full-size, four-door car with a group of male Spanish subjects and a male black traveling on Draper Avenue toward Woodruff. Officer Ponce pointed out the car to Officer Murrin. Officer Murrin then told Officer Ponce to continue driving eastbound on Woodruff as Officer Murrin maintained observation of the vehicle. As they passed the vehicle, Officer Murrin instructed Officer Ponce to turn the squad car around as they both continued to keep the green car in their sight. After Officer Ponce made the U-turn, the car under observation was coming toward the squad car. At that time, the car stopped and a black male subject and a Spanish male subject exited the car and began running away from the car. The Spanish subject held a red bag in his hand. Officer Ponce drove the car into a vacant lot which defendant ran across. Officer Murrin then instructed Officer Ponce to "cut him [defendant] off," pointing toward Antram Avenue. Officer Murrin exited

the squad car and began pursuit of defendant on foot. About two minutes later during Officer Ponce's attempt to locate his partner or defendant, Ponce heard five gunshots. Eventually, he saw defendant in the rear of a residence. Officer Ponce exited the squad car and yelled, "Halt, police." Defendant looked over his right shoulder at Officer Ponce and then ran off. Although Officer Ponce observed defendant holding a gun at a 45-degree angle, he did not fire at defendant because the distance was too far. He only observed that defendant was carrying a handgun and that defendant did not have any debris or blood on him. Officer Ponce at that time did not observe anything unusual about the right side of defendant's face. Soon afterwards, Officer Ponce found Officer Murrin, who was bleeding from the chest area, and immediately radioed for help.

Officer Ponce also stated that a week prior to this offense he and the deceased had had a discussion regarding a "wanted" flyer on defendant. The deceased had directed Officer Ponce's attention to the flyer and told him that he was going to find defendant later during patrol. The wanted flyer contained the nature of the charge and a picture of the suspect.

Willie Pitts, who lives at 1029 Antram Avenue, overheard part of the scuffle between defendant and the deceased. Pitts was working on his car in his backyard when he heard the sound of "fast running feet." At that time, he came out from under the hood of his car and looked to his right but saw nothing. When he looked to his left, he saw a young man (defendant) running down the alley with a police officer following in pursuit. Pitts observed that the officer had a gun in his right hand and that defendant was carrying a plastic bag in his left hand. Pitts stated that the young man (defendant) was Hispanic or Mexican. A few seconds later he heard someone say, "Stop fighting, damn it. I got you. You are

under arrest," and then he heard three quick gunshots followed by a pause and two more gunshots. Later he saw defendant come back down the alley and up on the hill behind his house. Pitts saw defendant vault one of the neighbors' fences while holding a gun in his right hand. He then saw defendant come back over the fence without the gun. Pitts stated that the left side of defendant's face did not have any unusual markings, blood or bruises. Pitts did not identify defendant as the young man he saw on the day of the offense. During cross-examination, defense counsel unsuccessfully attempted to sway Pitts regarding his prior statements.

To impeach Pitts, defendant presented Robert Brenczewski, a police officer for 14 years and an investigator for six of those years with the City of Joliet police department. Officer Brenczewski had taken statements from various witnesses, including Pitts, on September 12, 1984. Between 5:30 and 6 p.m. that day, he had spoken with Willie Pitts in Pitts' backyard.

Officer Brenczewski stated that Pitts told him that he first heard someone yell and then saw a male Mexican subject run by him. At that time, Pitts was working on his car in his backyard at 1029 Antram. Pitts was 6 to 12 feet from the alleyway. Pitts stated that he first heard a subject yell something to the effect, "Halt. I got you, God damn it. Freeze," and then saw a male Mexican wearing a red or maroon T-shirt with no collar and with black hair run past him. About 30 to 40 feet behind the male Mexican subject was a police officer with his gun drawn. Pitts heard the officer order the subject to halt and heard the officer yell, "Freeze. I got you." About 30 to 40 seconds later, Pitts heard a type of talking which he could not make out. Pitts did not tell Officer Brenczewski that he heard "Quit fighting" or "You are under arrest." When Pitts first saw the male Mexican subject running down the alleyway, he saw the sub-

ject carrying a plastic bag in his hand. Pitts told Officer Brenczewski that he was unsure of the exact color of the bag.

Pedro Palacios, a friend of defendant, was at his parents' house on September 12, 1985, working outside on his father's car when his brother David Palacios came up to him and told him that defendant was in the garage. Pedro stated that he then stopped what he was doing, went in the garage, and saw defendant putting on his brother David's clothes. Pedro saw that one of defendant's legs had a barbed wire cut on it and that defendant's face was "puffed up" on the right side. Pedro did not observe any blood by the eye and only a little blood on the leg which had been cut. Pedro did not see any other injuries on defendant but he did have a problem recognizing defendant at first. Defendant eventually told Pedro that he had just shot a cop. Pedro, David and defendant went downstairs into the basement to decide what to do next.

Defendant told the Palacios brothers that he had been chased by a cop. During the chase, defendant was carrying a bag with a 9 millimeter gun in it which he tossed. When the officer yelled "Freeze," defendant stopped and began to give himself up but the officer started to hit him repeatedly. When defendant could not take it anymore, defendant reached for the officer's gun. Defendant fired once and saw the officer turn around, say, "Oh, my God," and then defendant fired the rest of the shots.

At this point in the trial, the People introduced into evidence Pedro's taped statements pursuant to section 115—10.1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1985, ch. 38, par. 115—10.1) as a prior inconsistent statement. The People argued that Pedro's prior taped statements to the police were inconsistent with his testimony at trial. Detective Terrence Mazur, an officer

with the City of Joliet police department for 11½ years, took Pedro's statements on September 15 and 17, 1984. Defense counsel objected and the court allowed an offer of proof outside the presence and hearing of the jury.

During the offer of proof, both of Pedro's tape-recorded statements were played. Pedro stated that the tapes were accurate and that nothing had been added or deleted on the tapes. Pedro stated that the second statement was taken to clarify when defendant threw his gym bag away. Regarding the first statement, Pedro stated that Officer Mazur interviewed him for two hours and suggested things for him to say on the tape. Regarding the second statement, Pedro stated that during the recording Officer Mazur had turned off the tape recorder several times and questioned him regarding defendant's taking the gun out of Officer Murrin's holster. However, Pedro admitted at trial that Officer Mazur did not threaten him in any way, but that Officer Mazur told him that if he were lying, he would arrest him and "throw the book at him."

At the close of the offer of proof, the court allowed the People to question Pedro regarding his taped statements in the presence of the jury. Upon continuing direct examination regarding his second taped statement, Pedro admitted that he told Officer Mazur that defendant informed Pedro that he threw the gym bag away after he shot the officer. Under cross-examination Pedro stated that defendant told him that he threw the bag away before he came to the fenced-in area at the end of the alleyway and before his encounter with the deceased. Defendant also told Pedro that when he could not take the officer's hitting him anymore, he reached for the officer's gun. Pedro stated that Officer Mazur told him defendant reached for the gun, not vice versa. Pedro also stated that Officer Mazur suggested to him that

defendant kept shooting the gun into the deceased's body.

During redirect, Pedro stated that the police department told him to contact the State's Attorney's office. Pedro did contact and meet with the Will County State's Attorney. During the meeting, the Will County State's Attorney played both of Pedro's tape-recorded statements and asked if there were any additions, corrections or deletions to be made. Pedro replied at that time, "No." Pedro did not tell them about any problems with the taped statement until at trial.

The People then presented Officer Terrence Mazur. Officer Mazur stated that he took the tape-recorded statements of Pedro Palacios. As Officer Mazur read Pedro his constitutional rights, Pedro signed and initialed each right on the constitutional rights form.

During cross-examination, Officer Mazur stated that he asked Pedro to come back a second time on September 17, 1984, to get Pedro's responses on a tape regarding the gun and the gym bag. Officer Mazur stated that Pedro did tell him at the prior meeting that defendant had thrown the gym bag away while Officer Murrin chased him. Officer Mazur did put Pedro's version in his report but on the second session he wanted Pedro to put his version on a tape. Officer Mazur stated that he did not discuss Pedro's response prior to turning on the tape recorder.

Donald Havekost, a special agent with the Federal Bureau of Investigation, performed a neutron activation analysis (NAA) on the swabbing samples from Officer Murrin's hands sent by Officer Randall Fleck, who gathered the evidence from the site. In light of the NAA findings, Agent Havekost concluded that the deceased's left hand was on or near the muzzle of a firearm when it discharged. The chemical amounts in the swabbings removed from the back of the deceased's hands were con-

sistent with both hands' having been on or near the firearm when it discharged. Agent Havekost also concluded that the deceased's right hand could have been on or near the gun as it was discharged. Agent Havekost could not give an opinion regarding which hand was on the gun.

Officer Randall Fleck, a police officer with the City of Joliet for 10½ years, photographed the area and gathered various items of evidence. After he carefully collected the gym bag, he observed that it contained a bandanna, a Smith and Wesson 9 millimeter semiautomatic gun with a clip in it, a spare clip, a pair of brass knuckles, a bottle of cologne, a pack of Life Savers candy, a comb, and a watch. The bag also contained a partially empty bottle of Listerine and a gray cap from a spray paint can. In the photographs taken at the scene, the body was found 16 feet north of the bag. The fence was directly south of the body.

Officer Michael Sheridan, a police officer for the City of Joliet for 7½ years, was working the 3 to 11 shift on the night of the incident. He was patrolling in the area of the incident when, at 5 p.m., he heard a call on the squad car radio announcing that an officer was in foot pursuit and a later report that shots were heard. He found the deceased's gun 50 feet northwest of his body behind 1029 Antram on Draper. He also found a silver chain about two to three feet from the gun. However, under cross-examination he identified a similar chain as the one he observed that day at the scene, but the chain presented at trial was gold.

The People also presented Louis Silich, a police officer with the Joliet police department for 10 years. Officer Silich was working the 7 a.m. to 3 p.m. shift on September 12, 1984, as an evidence technician, but was called to report to work again at 5:15 p.m. and was instructed to go to the scene of the incident. At 1014 Dra-

per, he found two medals and a gold chain on top of a sloped area between the garage at 1014 Draper and the garden plot. At the bottom of the sloped area and 55 feet north of the deceased, he found a .38 special revolver. Officer Murrin's body was on the east side of the fence and the gun was found on the west side of the fence. Officer Silich later went to the hospital and collected evidence from and the personal belongings of the deceased. Among the evidence collected, Officer Silich recovered a knife from a sheath on the deceased's left leg.

Dr. Larry Blum, a forensic pathologist for the county coroners in 11 Illinois counties, performed the autopsy on Officer Murrin. He observed that Officer Murrin had been shot five times and also had injuries consistent with blunt trauma injuries, mainly abrasions or scrapes as well as bruising on the skin. Officer Murrin had bruises and abrasions to his right upper lip below the nostril, another vertical mark on the right ear as well as a prominent scratch behind the right ear. There was no evidence of healing and the abrasions were fresh.

Dr. Blum also found superficial scrapes or scratches on the left upper arm, on the back of the left arm and on the left forearm and a scrape behind the thumb on the palm surface on the left hand. The deceased also had abrasions on the right upper arm and on the back of the right elbow. On the back of the neck and the front right side of the neck, there were four parallel abrasions. Dr. Blum observed fresh abrasions on the deceased's front right knee and two abrasions on the back of the left knee.

Dr. Blum also observed several gunshot wounds. The deceased had a gunshot wound two inches below the top of his head in the center of his forehead which traveled from right to left. Dr. Blum stated that the gunshot wound to the forehead was fatal and was inflicted at a

distance of 6 to 24 inches, possibly farther. Another gunshot wound was in the right ear passing through the front of the ear and out the back, traveling from the left side to the right side with a downward trajectory. The gunshot wound to the right ear was not a fatal type and the range of fire for the ear wound was 6 to 24 inches. The gunshot wound to the right chest traveled from front to back toward the victim's left side at a 20-degree angle. It was not a fatal type of wound. The other chest wound to the right side was three inches below the uppermost wound traveling at a 60-degree angle downward. This wound was a fatal type inflicted within a six-inch firing range. The fifth wound was located on the left side of the chest traveling from left to right in a slightly downward angle. The firing range for this wound was greater than two feet.

The doctor gave an estimation "based upon common sense and medical knowledge" regarding the exact sequence of the gunshot wounds. He stated that the chest wounds were first because they produced a great deal of internal bleeding. If the head wound, which was fatal instantaneously, was first, it would have prohibited the victim from producing any significant amount of internal bleeding.

The doctor stated that the alcohol level found in Officer Murrin's blood was .043% and in Officer Murrin's urine was .02%. The doctor also stated that while .043% does not necessarily indicate intoxication, that level of alcohol may have different effects on individuals depending on whether or not that person is used to the effects of alcohol. A blood-alcohol level of .02 to .04 can have from no significant effect to a feeling of mild euphoria or a mild sense of well-being. If a person is accustomed to that level of alcohol, then the effects may be negligible.

The People presented Dr. Robert Hunton, a forensic scientist with the Bureau of Forensic Sciences Crime

Lab in Joliet, who specializes in the field of firearms identification. In performing tests to determine the distance at which defendant shot Officer Murrin, Dr. Hunton observed that the two entrance bullet holes on the right side of the shirt above the pocket were from a gun which was shot at a distance of less than an inch. The bullet hole on the left side of the shirt near the pocket was caused by a bullet from a gun which was fired within four to six feet.

Larry Knott, a police officer who had been with the Joliet police department for 17 years, is a court liaison for the police department and the Will County State's Attorney's office. On August 21, 1984, his duty was to obtain a warrant charging defendant with aggravated battery, a felony, in the shooting of Frederick Ferguson.

Michael Broadwell, a friend of defendant, stated that on September 12, 1984, he saw defendant first at defendant's house around 11 a.m. After 20 minutes, Broadwell and defendant left on defendant's bicycle to go to a creek on Abe Street. Broadwell was carrying a 9 millimeter pistol which he obtained from defendant's basement. Defendant and Broadwell stayed at the creek for 1½ hours to two hours. They made plans to leave the State once Broadwell was on parole from the work release center. While at the creek, they "got high" by sniffing spray paint and did some target practice. They then left for Johnny Garcia's house. When defendant and Broadwell arrived at the Garcias' house, only Johnny Garcia's brother Pauly was present. Johnny Garcia arrived later driving a green Buick. They stayed at the Garcias' house until it was time for Broadwell to return to the work release center. When Johnny Garcia gave Broadwell a ride, he was accompanied by Johnny's brother Pauly, defendant and Pepi Salazar, defendant's brother.

Thomas Stein, an officer with the Joliet police department for over four years, related a conversation he had with Officer Murrin on August 27, 1984. At that time they discussed the felony arrest warrant which charged defendant with aggravated battery in the shooting of Frederick Ferguson. Officer Stein told Officer Murrin that defendant might possibly be located on the east side of the City of Joliet and that he might possibly be with Johnny Garcia in Garcia's 1970 four-door green Buick Electra.

On May 21, 1985, Ruben Coronado, a police investigator with the City of Joliet, had picked up defendant in Laredo, Texas. Defendant had been found and arrested on the felony warrant for the instant offense in Mexico. On September 12, 1984, Officer Coronado radioed soon after the shooting of Officer Murrin that defendant might be in the car described at the scene and that the car was possibly owned by Johnny Garcia.

Officer David Gerdes, who had been with the City of Joliet police department for 13 years, was Officer Murrin's immediate supervisor on September 12, 1984. He was aware that Officer Murrin carried a knife on his leg which Officer Murrin had not directly requested permission to wear. According to Officer Gerdes, as well as other supervisors and division commanders, department policy guidelines did not prohibit the carrying of the type of knife worn by Officer Murrin.

Pamela Ann Murrin, wife of the victim, stated that on September 12, 1984, her husband was 32 years old and in excellent health. He was particularly happy on September 12 because he had just scored very high on a sergeant's test and was looking forward to becoming a sergeant. The only injury the victim had was an old scab on his knee. His uniform clothes on that date were in good condition. She knew of no drinking problem her

husband had but knew that he did drink socially, and on occasions he would have a beer at lunch.

Stipulations were entered for other witnesses. Donna Metzer, a forensic serologist for the Illinois Department of State Police, analyzed various blood samples from the deceased and defendant as well as clothes items from both. In examining the deceased's pants, she found a tear on the right front knee area and a second tear on the right rear area of the pants. When she examined defendant's yellow sweatshirt found near the scene, she found several small areas of blood staining. On the left shoulder of the sweatshirt she found a small smear of human blood and on the lower right back, she found small droplets of human blood. Both areas of stains were applied from the outside and did not soak through the garment. The amount of blood was insufficient to determine the source. She also found two smears of human blood on the inside of the shirt on the left side. The quantity of this blood smear was also insufficient to determine the source.

The second stipulation was that of Jacqueline Fracaro, a fingerprint examiner for the State of Illinois, Bureau of Scientific Services at the Joliet Crime Lab. When examining the gun magazine recovered from the gym bag, she found four latent fingerprints which she determined to be those of defendant. She also recovered a latent fingerprint from a gray paint can cap and determined the print to be defendant's.

The third stipulation was that of Blair Shutts, a forensic scientist for the State of Illinois, Bureau of Scientific Services at the Joliet Crime Lab. When Shutts examined the yellow sweatshirt, the plastic wrap and the tennis shoes, he found that all had a silver gray paint on them which was similar in color and chemical reactivity. It was stipulated that Officer Rex Provenzale recovered the plastic wrap from Johnny Garcia's green Buick.

The remaining stipulations regarded who found each of the projectiles and other evidence recovered at the scene.

Eventually, defendant took the stand. He first stated that his birthday is February 20, 1966. After three years of high school he dropped out and went to work. He stated that in early August 1984, he was staying with his grandparents in Houston, Texas. During the three to four weeks he was in Houston, he did not contact his parents, only his brother Tony. Prior to living in Texas, and after returning to Illinois, defendant stayed with his brother Tony Silvas in New Lenox. He returned to Illinois either the 10th or 11th of September. He identified the gold chains and religious medals found at or near the scene as his.

Defendant also stated that on September 12, 1984, he left his brother's house by bike and traveled to his parents' house, where he later met with Broadwell. Defendant had his 9 millimeter gun with him but Broadwell ended up carrying it. Defendant's and Broadwell's versions of the events prior to and up until the time Broadwell was left at the work release center are similar.

Defendant stated that after he, Pauly and Johnny Garcia, and Pepi Salazar, defendant's brother, dropped Broadwell off at the work release center, they went to Theresa Jones' house to pick up Norman Gates. They then drove to Norman's house. While Norman was at his house, Norman picked up his gun. They then left to go to defendant's grandfather's house to do some target practice. Defendant was sitting in the front passenger side, Norman was sitting in the rear driver's side, Johnny Garcia was driving, Pauly Garcia was sitting in the center of the rear seat and Pepi Salazar was sitting on the passenger side in the rear.

As they drove around, defendant began to sniff paint from a bag. He did not, therefore, see the squad car driven by Officer Ponce pass in front of the car in which he was riding at the intersection of Draper and Woodruff. One of his friends in the car stated, "Put the bags down. There is a cop in front of us." When defendant saw the squad car turn around, he told Norman to "jump out of the car" because they both had a gun. Defendant ran into a grass alleyway. He then heard someone yell "Freeze" or "Freeze, police." He looked back and saw the officer (Murrin) with his gun but kept running because he wanted to get rid of his gun. He finally came upon a fenced-in area which was a dead end. Defendant then threw the gym bag with the gun in it into some bushes. When defendant again turned around, he saw the officer who yelled "Freeze." Defendant, who was facing the fence, put his hands up. Through the corner of his eyes he saw the officer put his gun away. After the officer put his gun away, he turned defendant around and hit him in the right eye and continued to hit him. The officer and defendant then ended up on the ground with the officer on top of defendant in a kneeling position. The officer hit defendant approximately seven or eight times. Defendant kept saying, "I give. I give." At that point, when defendant either pushed or punched the officer, the officer reached for his gun. Defendant also reached for the officer's gun. The struggle continued until defendant fell back and the gun went off and kept going off. Defendant did not recall where the officer was shot. The next thing defendant remembered was walking away and then hearing a police officer yell something to the effect of "Freeze, freeze police." Defendant threw the officer's gun away, jumped over the fence and kept running.

On that day defendant was wearing a yellow T-shirt, jeans and tennis shoes. After defendant shot the officer

and vaulted a fence, he ran on a path along a creek until he came to the Palacios' house. During the run, he took off his pants and shirt. While at the Palacios' house, defendant put on some of David Palacios' clothes. Later, Pedro and David Palacios investigated the scene and told defendant that they heard that he would be shot on sight. The Palacios brothers left the house again and went to the house of defendant's parents to contact defendant's brother George. When the Palacios brothers came back, they told defendant that someone would be coming for him. A man named "Bill" came to the Palacios residence and put defendant into the trunk. Later Bill let defendant out of the trunk and they continued traveling until they reached California. When they arrived in Tijuana, Mexico, defendant left for Monterrey, Mexico.

During cross-examination, defendant stated that his gym bag contained brass knuckles, a comb, a watch, a bottle of cologne and a bottle of Listerine. Defendant also stated that for about half a year, from 1983 to 1984, he had received boxing training about every other day for about two to three hours. He also had taken Tae-Kwan Do self-defense lessons which involved the use of the body and mostly the hands.

It is a fundamental principle of due process that the prosecution must prove every element of an offense beyond a reasonable doubt. (*In re Winship* (1970), 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375, 90 S. Ct. 1068, 1073.) The fact finder may infer intent to take a life from defendant's acts and the circumstances surrounding the commission of the offense. (*People v. Garcia* (1983), 97 Ill. 2d 58, 85.) Intent to take a life may specifically be shown not only from the character of the assault and the surrounding circumstances but also from the use of a deadly weapon. (*People v. Koshiol* (1970), 45 Ill. 2d 573, 578.) Whether or not this court views the evi-

dence in a light most favorable to defendant (see *People v. Garcia* (1983), 97 Ill. 2d 58, 85), it is well established that every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act. (*People v. Koshiol* (1970), 45 Ill. 2d 573, 578.) Where a man wilfully does an act, the natural and direct tendency of which is to destroy another's life, the trier of fact may reach a "natural and irresistible conclusion," in the absence of qualifying facts, that the act to destroy another's life was intended. (45 Ill. 2d at 578.) In this case, even looking at the evidence most favorably to defendant, this court finds that the uncontroverted evidence presented at trial concerning defendant's conduct and the physical evidence reveals that defendant had the requisite mental state.

Defendant argues that he ran from the officer because defendant had a gun in his possession and not because there was an outstanding felony warrant issued against him. However, his explanation is without support from the evidence. Defendant explains that he was running from a misdemeanor, not a felony warrant. It is, however, unlikely that defendant would run from a misdemeanor charge. Rather, defendant's actions prior to this offense reveal his knowledge of the felony warrant. Soon after the shooting incident of Frederick Ferguson, which resulted in the felony warrant, defendant left the State, and upon returning, made plans to leave the country the next day with his friend, Broadwell.

Defendant also stated that he threw away the gym bag with the gun in it as he saw the officer approach but before he became "fenced in" at the end of the alleyway. At this point defendant stated that he stopped while facing the fence and put his hands up. His explanation that he gave up at this time because he was "fenced in" does not coincide with his ability to vault fences immediately after the offense. Defendant's version also does not

agree with his later account that he surrendered only after the infliction of numerous blows to his face by the deceased. Defendant's testimony to the contrary reveals that he did not surrender at that time because he eventually struggled for and obtained the deceased's gun. This court finds that even in the light most favorable to defendant, the evidence shows that defendant, in his attempt to escape by vaulting the fence, was approached and stopped by Officer Murrin. At this point a struggle ensued and not any semblance of a surrender.

This court concludes that with defendant's training and experience as a boxer, and with his training in Tae-Kwan Do and the evidence adduced at trial, Officer Murrin received the beating and not defendant. Officer Murrin no doubt was able to strike defendant in the face but defendant, in his attempt to escape, administered most of the punches in the struggle. The autopsy revealed that the officer had fresh abrasions and bruises on his body. While the evidence reveals that defendant left basically unscathed, Officer Murrin sustained bruises and abrasions to his right upper lip and a vertical mark on his right ear as well as a scratch behind his right ear. He also had scratches on the back of his left upper arm and on his left forearm, a scrape behind the thumb on the palm surface of the left hand, and abrasions on his right upper arm and on the back of his right elbow. On the back of his neck and on the front right side of his neck four parallel abrasions were found. Officer Murrin also sustained abrasions on his front right knee and two abrasions on the back left knee. Compared to defendant's puffiness in his right eye, it is apparent that defendant was the aggressor.

To corroborate defendant's version of the struggle, he refers to Pedro Palacios' statements, Officer Murrin's blood-alcohol level and use of a sheath knife and defendant's broken neck chains. However, these facts do not

support the proposition that Officer Murrin was the aggressor. Pedro's statement reveals that defendant only attempted to give up during the struggle. Pedro's description of defendant's face immediately following the incident is not comparable to the injuries sustained by Officer Murrin. Moreover, Willie Pitts and Officer Ponce did not notice any injuries to defendant's face as he fled the scene. Defendant's version of the struggle is not supported by the testimony at trial. Further, evidence of the broken neck chains reveals that Murrin may have been restraining defendant from escaping or may have been defending himself in the short-lived struggle. Of significance is the fact that Pitts and Officer Ponce stated that the incident happened in a matter of a few minutes and as such rules out any possibility of a drawn-out struggle as indicated by defendant.

Defendant points out that the officer's blood-alcohol level and his sheath knife attached to his leg show that Officer Murrin was the aggressor. However, the testimony at trial did not conclusively show that the officer was intoxicated. The deceased was known to drink socially and was accustomed to the effects of alcohol and, as such, the effects of alcohol would have been negligible. The evidence reveals that the officer was in an exceptionally good mood because he just received his scores back from the sergeant's exam and found out that he would be promoted. Although the deceased carried a sheath knife without department permission, it was not against the department rules to carry one, and the deceased's immediate supervisor knew about the knife. This court finds that these facts do not reveal an aggressive, law-breaking individual.

Defendant also alleges that the officer kept hitting him even after he yelled, "I give." At that point defendant alleges that he punched or pushed the officer and a struggle ensued. When he saw the officer reach for his

gun, the next thing he remembers was the gun going off. However, defendant's version does not support the view that he was surrendering but, rather, that defendant was exercising a ploy to catch the officer off guard in order to renew his escape with added vigor.

Defendant argues in the alternative that if the People did prove beyond a reasonable doubt his intention to kill the officer, he did so in self-defense. However, as previously stated, the evidence does not support defendant's argument. First, the struggle was one-sided. Second, defendant had a motive to escape from a felony warrant and not from a potential misdemeanor charge, and he had already made travel plans to leave the country after just arriving in town. Third, there is no persuasive evidence that the officer was the aggressor. Although Officer Murrin had a .04 blood-alcohol content, a person such as the officer, who was a social drinker, would not experience the mild euphoria associated with that level of alcohol. It is unlikely that Officer Murrin experienced any elevated state of well-being resulting in a more aggressive stance in his pursuit of defendant. Furthermore, the evidence reveals that the officer had no difficulty pursuing defendant. Thus, defendant's argument is without support.

Defendant argues also that, in the alternative, the evidence reveals that he committed voluntary manslaughter, in that he intentionally or knowingly killed an individual because he believed the circumstances to be such that, if they existed, would justify or exonerate the killing even if his belief is unreasonable. (Ill. Rev. Stat. 1985, ch. 38, par. 9—2.) In this case, defendant did not act with any unreasonable belief that would justify his taking of the deceased's weapon and shooting the victim five times at very close range. The facts reveal that defendant had motive to flee and was the initial aggressor in the struggle as well as the dominant figure in the

short-lived altercation which followed. He also fired the gun at the deceased not once but five times at very close range. When Officer Ponce arrived near the scene, he saw defendant standing with the gun pointed downward at a 45-degree angle. Except for defendant's testimony, nothing in the record reveals that he acted in any other way but deliberately and intentionally to kill Officer Murrin.

Defendant also argues in the alternative that he should be found guilty of involuntary manslaughter in that he unintentionally killed the officer without lawful justification because his acts, whether lawful or unlawful, caused the death to the deceased and he performed those acts recklessly. (Ill. Rev. Stat. 1983, ch. 38, par. 9—3.) As stated previously, the evidence reveals that defendant acted intentionally. His knowledge of how to fire a gun, his statement that he did reach for the gun, his motive to escape and his dominant and aggressive role in the struggle show that the act was intentional.

Thus, this court concludes that the People proved beyond a reasonable doubt that defendant acted with intent to kill Officer Murrin, a peace officer acting within the scope of his duties. "A voluntary and wilful act which has the natural tendency to cause death or great bodily harm is sufficient evidence of the intent required for the offense of murder." *People v. Foster* (1987), 119 Ill. 2d 69, 88.

III

Defendant next raises the issue that the circuit court erred in admitting evidence of the felony arrest warrant charging defendant with aggravated battery against Frederick Ferguson and the complaint. It is well recognized that "relevant evidence" has been defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." (*People v. Stewart* (1984), 105 Ill. 2d 22, 54.) It is also established that "[e]vidence of other crimes, while not admissible to show the propensity to commit crime, is admissible to show motive." (105 Ill. 2d at 56.) Furthermore, "while any evidence which tends to show that an accused had a motive for killing the deceased is relevant, such evidence, to be competent, must at least to a slight degree tend to establish the existence of the motive relied on." (105 Ill. 2d at 56.) Only where the relevance of evidence depends on unproved assumptions is it inadmissible. (*People v. Newbury* (1972), 53 Ill. 2d 228, 240; *People v. Jones* (1982), 108 Ill. App. 3d 880, 884.) Specifically, an arrest warrant and complaint are inadmissible where the existence does not establish anything about the defendant's state of mind. See *People v. Wilson* (1987), 116 Ill. 2d 29, 52.

In this case, the evidence of the warrant and complaint is admissible in light of the facts established at the trial. Defendant's motive to kill the officer is reflected in defendant's leaving the State of Illinois after the shooting incident of Frederick Ferguson, which resulted in the arrest warrant and complaint of August 21, 1984. Defendant stated that on the date of the shooting of Officer Murrin, he had just returned from Texas and was planning to leave the area with a friend who was being released from a work release program the next day. When defendant saw the police car beginning to follow the car he was in, he immediately fled. The evidence surrounding his flight and the subsequent struggle reveals defendant's strong desire to escape.

The testimony at trial also reveals that defendant actually threw the gym bag over the fence prior to his attempt to vault it, defendant was the initial aggressor and dominant figure in the struggle, and defendant eventually shot the officer not only once but five times

at close range and immediately fled not only the area but also the country. The extent to which defendant fought to escape does not show someone who was fleeing a misdemeanor offense. Rather, the evidence supports the admissibility and relevancy of the arrest warrant and complaint to show his motive to escape, and to make it less probable that Officer Murrin was the aggressor. Thus, this court finds that the court did not err in allowing the evidence of the arrest warrant charging defendant with aggravated battery, and the complaint, into evidence at the trial.

IV

Defendant argues that the circuit court erred when it permitted the People to introduce two entire prior taped statements of Pedro Palacios where allegedly only two inconsistencies existed. Defendant specifically argues that Pedro's statements did not contain enough inconsistencies to be admitted into evidence as substantive evidence. Defendant does not argue that Pedro's statements do not meet the other requirements of the statute.

The People argue that not only were Pedro's prior taped statements inconsistent with his testimony at trial but the tapes also contradicted another witness' testimony regarding the circumstances surrounding the making of those tapes. Accordingly, the People argue that the circuit court properly admitted both taped statements in their entirety. On appeal, this court will not substitute its opinion for the circuit court's and will only reverse a circuit court's decision where it has abused its discretion.

Section 115—10.1 of the Code of Criminal Procedure of 1963 provides, in part:

"In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement ***

***

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

***

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder ***." Ill. Rev. Stat. 1985, ch. 38, par. 115—10.1.

Since defendant did not raise the issue whether the taped statements met the statutory requirements, this court will not discuss it. In our reading of the statute, we find that it does not require a certain minimal amount of inconsistencies. We do, however, find several inconsistencies in Pedro's taped statements with trial testimony. In the first statement, Pedro stated that (1) his brother David told him that defendant was in the back; (2) that the officer hit defendant once in his eye and defendant hit him back; and (3) that when the officer started to fall back, defendant grabbed the officer's gun and shot the officer once and then fired the rest of the bullets. In the second statement, Pedro stated that after defendant shot the officer, he threw the gym bag away. In Pedro's trial testimony, he stated that defendant told him that defendant threw the gym bag away before his encounter with Officer Murrin; and that defend-

ant reached for Officer Murrin's gun because defendant could not take the beating by the officer. Pedro also stated that his brother actually told him that defendant was in the backyard "all beat up."

In defendant's argument, he specifically attempts to have this court proclaim a quantitative or mathematical analysis as a prerequisite to the application of section 115—10.1. If the General Assembly had intended such a prerequisite, it could have provided for it in the statute. The General Assembly, however, provided for the circuit court to have discretion in determining whether or not the testimony is inconsistent with a prior statement. A circuit court's discretion is not based on a quantitative analysis but a qualitative one. In some circumstances, this court recognizes that a mere tendency to be inconsistent will be enough to admit the statements into evidence and in other circumstances more than a mere tendency would be needed to admit the statements. It is for the circuit court to determine the issue. Although this court finds that the above-listed inconsistencies are few, these inconsistencies are significant and specifically relate to the credibility of Pedro himself. These inconsistencies also affect the credibility of Officer Mazur and defendant. Pedro's testimony at trial reveals a different set of circumstances surrounding the making of both tapes as well as a different version of the incident. Since the taped statements go to the issue of Pedro's credibility, the circuit court did not err when it admitted the taped statements into evidence.

V

Defendant argues that the circuit court erred when it permitted the People's witness, a pathologist, to testify regarding the sequence of the gunshot wounds. Defendant alleges that the pathologist's testimony was based upon mere conjecture and speculation and not upon any

well-recognized scientific principle or technique. Defendant does not argue that the pathologist was not qualified to answer the question; defendant argues that the pathologist's testimony was not based upon a reasonable degree of medical certainty but rather that the testimony was based on merely "some estimations" and was therefore impermissibly speculative.

It is well established that the burden of establishing the qualifications of an expert witness is on the proponent of the expert testimony. Once the proponent has established the expert's qualifications, it is then within the discretion of the circuit court to determine whether the proponent has met its burden of qualifying an expert witness. This court will only reverse that decision if it constituted an abuse of discretion. (*People v. Park* (1978), 72 Ill. 2d 203, 209; see *People v. Jordan* (1984), 103 Ill. 2d 192, 208.) The People met their burden of establishing Dr. Larry Blum's qualifications.

On direct, the People examined Dr. Larry Blum, the pathologist, regarding each of the five gunshot wounds. The doctor, based upon his medical knowledge and experience, related the distance and angle at which each wound was inflicted, the direction the bullet traveled in the body and the damage to the body each bullet caused. Dr. Blum also stated that he had done 850 autopsies and appeared in court 35 times. When the People asked his knowledge of the possible sequence of the gunshot wounds, Dr. Blum stated:

> "I just don't know of any foolproof way of determining various gunshots.
>
> There are some estimations, based upon common sense and medical knowledge, that can be made, but as to the exact sequence of gunshot wounds, unless you were there and actually saw it, I know of no absolute way of absolutely reconstructing them."

When the People then asked Dr. Blum if he had an opinion regarding the sequence of the gunshot wounds, defendant objected, arguing that the opinion was speculative. At that time, the circuit court ordered the jury out of the courtroom and heard arguments. The circuit court then personally asked Dr. Blum:

> "THE COURT: All right. You indicated you have an opinion as to the chest wounds that caused a large amount of bleeding as opposed to the wound of the forehead; is that correct?
>
> THE WITNESS: Yes, your Honor.
>
> THE COURT: Is that opinion, what we are talking about, is that based upon a reasonable degree of scientific certainty?
>
> THE WITNESS: Yes, your Honor.
>
> THE COURT: All right. Bring back the jury.
>
> If the question is asked, I am going to allow him to answer it."

The court then allowed the People to present an offer of proof. At the end of the offer of proof, defendant still objected but the court allowed Dr. Blum to testify regarding the question. Dr. Blum stated that in his opinion, within a reasonable degree of medical certainty, the head wound followed the chest wounds because of the large amount of internal bleeding present in each chest cavity. If the head wound came first, it would have resulted in the victim's death immediately and any subsequent wounds to the chest or elsewhere would not have resulted in this much bleeding.

In this case, the record reveals that the circuit court did not abuse its discretion. First, the expert was not testifying to matters within common knowledge of the lay person and his testimony aided the trier of fact in reaching a conclusion. (*People v. Jordan* (1984), 103 Ill. 2d 192, 208.) Further, his opinion was not speculative but based on matters requiring scientific knowledge. His

particular skill and judgment was essential to explain the cause and effect of each injury. (*People v. Ciucci* (1956), 8 Ill. 2d 619, 626, *aff'd* (1958), 356 U.S. 571, 2 L. Ed. 2d 983, 78 S. Ct. 839.) In this case, Dr. Blum testified regarding the amount of blood loss which had occurred from the various gunshot wounds. His testimony also explained why a certain amount of blood loss would occur if the officer were still alive and how much blood loss would have occurred if the officer had died from the head wound prior to the chest wound. Thus, the testimony given by Dr. Blum required special skill and knowledge and as such, his resulting opinion on the order of gunshot wounds was not based on mere estimations and was not impermissibly speculative. Thus, this court finds that the circuit court did not abuse its discretion.

VI

Defendant argues that he was denied a fair trial because the deceased officer's widow was allowed to testify about the length of the couple's marriage, the lack of marital problems and the couple's school-age children. This court notes that although defendant objected to this testimony at trial, he failed to reassert the issue in his post-trial motion and as such the issue is properly deemed waived. (*People v. Wright* (1985), 111 Ill. 2d 128, 153.) Moreover, had there been no waiver, this court finds that defendant was not prejudiced.

It is established that the testimony of a life-and-death witness which is given for the purpose of establishing the identification of the decedent is admissible for those purposes. "Furthermore, it is not always error to admit evidence showing that a murder victim has left a spouse or children when such evidence is elicited in an incidental manner not causing the jury to believe such evidence is material." *People v. Thompkins* (1988), 121 Ill. 2d 401, 446.

In this case, Mrs. Murrin testified to the length of their marriage, the absence of marital problems, the deceased's physical condition, the deceased's state of mind, the presence of only one old wound on his knee, the condition of his clothes as he left for work, the deceased's drinking and eating habits, and the deceased's mental state prior to leaving for work. Her testimony only related facts regarding the physical and mental state of the deceased on the day of the incident. Furthermore, her testimony was relevant to defendant's claim of self-defense. Her one and only reference to the existence of children was:

> "STATE'S ATTORNEY EDWARD PETKA: And were you regularly with him or were you in and out of the home?
>
> MRS. MURRIN: Oh, I was in and out of the house all day, because I was trying to get the yard work done before the kids came home from school."

Although the reference to the couple's children was unnecessary, it was inadvertent, incidental and innocuous, especially in light of the entire testimony. Thus, this court finds that defendant was not denied a fair trial because of the admission of Pamela Murrin's testimony.

VII

Defendant argues that the circuit court committed reversible error when it instructed the jury on People's instructions Nos. 18A, 19B and 20A because the evidence failed to warrant their use. Defendant specifically argues regarding instruction No. 18A that it was not only a non-Illinois Pattern Jury Instruction (IPI), but that it was also an incorrect statement of the law.

People's instruction No. 18A provides:

> "A person is not justified in the use of force if he is escaping after he has been charged with the commission of a forcible felony." See Ill. Rev. Stat. 1983, ch. 38, par.

7—4(a); Illinois Pattern Jury Instructions, Criminal, No. 24—25.10 (2d ed. 1981) (hereinafter IPI Criminal 2d).

People's instruction No. 19B provides:

"A peace officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defend himself from bodily harm while making the arrest.

However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes both that such force is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested has committed or attempted a forcible felony; or is necessary to prevent the arrest from being defeated by resistance or escape and the person to be arrested is attempting to escape by use of deadly weapon or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay." See IPI Criminal 2d No. 24—25.12; Ill. Rev. Stat. 1983, ch. 38, par. 7—5(a).

People's instruction No. 20A provides:

"A peace officer who has an arrested person in his custody is justified in the use of any force which he reasonably believes to be necessary to prevent the escape of the arrested person or to defend himself from bodily harm while preventing the escape.

However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes both that such force is necessary to prevent the escape and the person attempting to escape has committed or attempted a forcible felony; or is necessary to prevent the escape and the person is attempting to escape by use of deadly weapon or otherwise indicates that he will endanger human life or inflict bodily harm unless prevented from escaping without delay." See IPI Criminal 2d No. 24—25.13; Ill. Rev. Stat. 1983, ch. 38, par. 7—5(a).

Although defendant includes instruction Nos. 19B and 20A in his argument, he failed to offer any support for

his argument and, accordingly, has waived any argument. However, this court will address those instructions in connection with instruction No. 18A.

Regarding People's instruction No. 18A, defendant argues that the court should have instructed the jury on IPI Criminal 2d No. 24—25.10 and not the submitted version. It is well established that the circuit court need not use an IPI instruction when it determines that it does not accurately state the law. (107 Ill. 2d R. 451(a).) Further, it has been established that a jury instruction is "to convey to the minds of the jury the correct principles of law applicable to the evidence submitted to it in order that, having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence." *People v. Gambony* (1948), 402 Ill. 74, 81-82; *People v. Mitchell* (1975), 27 Ill. App. 3d 117, 121.

In order to determine whether the amended IPI instruction was proper, the court must look at the IPI instruction in light of the facts and any relevant applicable law. In this case, defendant immediately left the area after the commission of aggravated battery against Frederick Ferguson, a forcible felony for which there was an eventual arrest warrant. Defendant did not come back into the area until just prior to the instant offense. Furthermore, his only reason to return to the area was to have a friend accompany him in leaving not only the State, but the country. There appears to have been no longing by defendant to be home with his family because, as defendant stated at trial, he had had no contact with his family during the weeks he was in Texas. His only contact with his family was when he called his brother, Tony, prior to leaving Texas. In light of these facts, it appears that defendant was not only still escap-

ing but was also "on the run" from the commission of a forcible felony.

Our conclusion that defendant was still escaping must also be read in light of the escape statute, the amended IPI instruction and the facts of this case. (Ill. Rev. Stat. 1983, ch. 38, par. 31—6.) One element of escape is that defendant has been charged and escape is an especially serious offense if committed by a felon. (*People v. Simmons* (1981), 88 Ill. 2d 270, 275.) In this case defendant, a felon, used force in an attempt to escape from a forcible felony with which he had been charged. Since IPI number 24—25.10 and section 7—4 describe those persons who cannot use force, the modified IPI instruction submitted to the jury not only accurately described the facts presented to the jury but also submitted a description of the applicable law.

However, defendant argues that section 7—4(a) refers to escape immediately following the commission of a forcible felony. He specifically argues that "the legislative intent was not to remove a person's right to self-defense for an indefinite time period after the commission of a forcible felony." This court finds defendant's interpretation too restrictive. The court further finds that defendant's argument relies on an assumption that even without the word "immediately" in the statute or the IPI instruction, the General Assembly intended the statute to mean "immediately" after the commission of a forcible felony. Defendant does not cite any authority for this assumption.

In reading the statute and the accompanying committee notes, it is apparent that the assumption that a person must be in the process of committing a forcible felony or that a person must have just completed the commission of the forcible felony is a misunderstanding of the intent of the statute. This court finds that the General Assembly did not intend to limit section 7—4 as

suggested by defendant. The General Assembly intended the statute to cover situations prior to the commission of a forcible felony, at the time of the commission of a forcible felony, and after the commission of a forcible felony, without reference to a specific time period. In reading the statute it is clear that the General Assembly did not fix a definitive time period so as to allow the statute to be applicable to all the circumstances which may surround the commission of a forcible felony. We have no doubt that the General Assembly intended to cover situations such as the one before this court. The record reveals that defendant had knowledge of the charge of a forcible felony against him and that he absconded himself from the area only to return in time to meet with a friend who was just being released from a work release center in order to plan leaving the country the following day. Thus, this court finds that the evidence warranted the use of the amended instruction. Accordingly, the circuit court did not commit reversible error.

Defendant also argues that the evidence did not warrant the use of instructions 19B and 20A. These instructions, however, must be read in light of instruction number 18A and the facts of this case. A police officer is justified in using force likely to cause death or great bodily harm when he reasonably believes both that such force is necessary to prevent the escape of a person and that the person is using escape to defeat the arrest. We agree with the People's reasoning that without these instructions the jury would not have been able to find that the alleged use of force by the deceased officer was justified under section 7—5 absent the officer's reasonable belief that defendant had voluntarily placed himself in the position of an immediate aggressor. We also find that without these instructions the jury would find section 7—4(a) inapplicable without defendant's voluntary place-

ment of himself in the position of an immediate aggressor.

Furthermore, since an officer is entitled to utilize even deadly force when he reasonably believes it necessary to effectuate an arrest for a forcible felony, our analysis of the legislative intent regarding instruction 18A was proper. Section 7—4 only contemplates a situation in which the person who has provoked the use of force but not deadly force against himself and who then becomes unexpectedly threatened with deadly force. (Ill. Ann. Stat., ch. 38, par. 7—4, Committee Comments, at 408-09 (Smith-Hurd 1972).) However, as in this case, a person who is escaping after the commission of a forcible felony cannot argue that the use of force by a police officer to prevent escape from a forcible felony was unexpected. (Ill. Rev. Stat. 1983, ch. 38, par. 7—5.) Thus, defendant in this case who was also a forcible felon at the time of the instant offense cannot claim a qualified right to meet excessive force with deadly force and it is defendant who must suffer the legal consequences of his choice to kill. (Ill. Ann. Stat., ch. 38, par. 7—4, Committee Comments, at 408-10 (Smith-Hurd 1972).) In light of these findings, this court finds that all three of the instructions were proper; accordingly, the circuit court did not commit reversible error.

VIII

Defendant argues next that the circuit court abused its discretion when it admitted into evidence irrelevant and unreliable hearsay at the death penalty hearing. This court finds that defendant misunderstands the function of the death penalty hearing.

At the death penalty hearing the nature of the crime and the character of the accused are considered. (*People v. Stewart* (1984), 104 Ill. 2d 463, 492.) In order to allow all relevant evidence in at the aggravation and mitiga-

tion hearing, the restrictive rules of evidence do not govern. (*People v. Perez* (1985), 108 Ill. 2d 70, 86.) Rather, at the hearing the evidence is admissible on the grounds of relevancy and reliability. These prerequisites must be met to the satisfaction of the trial judge's sound discretion. (108 Ill. 2d at 88.) Evidence is relevant if it has "any tendency to make the existence of any [material] fact *** more probable or less probable than it would be without the evidence." *People v. Free* (1983), 94 Ill. 2d 378, 413.

Defendant argues that the testimony regarding his gang affiliation was "completely and totally irrelevant to the shooting in the instant case." We find otherwise. It is established that proof of prior misconduct is deemed relevant to a defendant's character although it may not have resulted in prosecution (*People v. Brisbon* (1985), 106 Ill. 2d 342, 365) and proof of defendant's "propensity" to conduct himself in a particular manner is sufficiently relevant to be admissible at the death qualification hearing (*People v. Free*, 94 Ill. 2d at 424). Furthermore, any evidence regarding defendant's character is relevant. *People v. Stewart*, 104 Ill. 2d at 492.

Some of defendant's objections are to hearsay evidence regarding his gang affiliation. However, this court finds that without evidence regarding his character, the jury would not have had all of the necessary information to decide the death qualification issue. Moreover, the People's evidence concerning defendant's gang affiliation was corroborated, thereby making the evidence not only relevant but also reliable. In defendant's argument, he specifically refers to the testimony of Officer Coronado, to the testimony of Police Officer Robert Simandel, and to the testimony of FBI Special Agent Wayne Zydron.

Officer Coronado stated that on August 14, 1984, he spoke with defendant's parents and specifically told defendant's mother that defendant was a member of the

Latin Kings gang. He was looking for defendant regarding a shooting incident for which defendant was later charged. Officer Simandel, who has been an officer with the Chicago police department's gang crimes section for 13 years, was shown the photographs taken of defendant as he arrived at the jailhouse after his arrest for the instant offense. He stated that the photographs showed defendant "putting down the Disciples" street gang with a hand gesture. Agent Zydron stated that he interviewed Lewis Zamudio, who told him that he (Zamudio) was a former general in the Latin Kings gang and defendant was a lieutenant in the Latin Kings.

Each of the witnesses gave testimony which revealed information about not only defendant's character but also defendant's social environment. Moreover, each of the statements are intertwined and add to the reliability of the statements.

Officer Coronado's testimony was corroborated by Zamudio's October 27, 1984, statement that defendant was a lieutenant in the Latin Kings street gang and by Simandel's testimony that a photograph taken of defendant after his arrest depicted him as seriously degrading the Disciples, a rival gang, through a hand gesture. Furthermore, Officer Coronado gathered his information during an official investigation of the aggravated battery incident against Ferguson prior to the instant offense and defendant never directly challenged Officer Coronado's testimony. See, *e.g.*, *People v. Morgan* (1986), 112 Ill. 2d 111, 143-44.

Defendant presented two witnesses, Maurice Sherrod and Gabriel Ben Moreno, to challenge the testimony regarding gang affiliation. Sherrod testified that he had known defendant since junior high school and did not know defendant to be a gang member or carry a gun. However, Sherrod had only seen defendant once between the summer of 1983 and the time of the offense at issue.

Moreno, a boxing coach for the Joliet park district, stated that he did not know defendant to associate with any gang. Moreno, however, had not worked with defendant since approximately 1983 and had heard others state that defendant was a gang member.

Defendant also argues that Frederick Ferguson's statements to Officer Saxon regarding the person who shot him in the legs were not relevant or reliable. However, as the People point out, defendant opened the door on the matter by suggesting during cross-examination of Officer Saxon that no probable cause existed for the arrest at the time the police sought to question defendant on the shooting. Furthermore, Ferguson's statements were sufficiently corroborated to render them reliable.

Ferguson did not initially cooperate with the police because he wanted to handle the matter himself. Later, when he did decide to cooperate, he stated that a driver of an orange vehicle, which had pulled up alongside him as he stood in front of 322 South Ottawa Street, had shot him in the leg with a sawed-off shotgun. The driver was accompanied by three black males. He described his assailant as a 16- to 17-year-old Mexican male who attended Joliet High School and whose nickname was Junior. Ferguson also stated that the assailant yelled "L.K." as he fired the gun. Ferguson also positively identified defendant as the assailant.

James Booker and Beatrice Mays, witnesses to the shooting incident, corroborated the fact and location of the shooting. Identification of defendant as the assailant was corroborated by his nickname of Junior, his attendance at Joliet High School, his physical appearance and his eventual flight after the shooting, which in this case reflects consciousness of guilt.

Defendant argues that the above-mentioned facts were not reliable because of other conflicting testimony. For instance, Ferguson made inconsistent statements re-

garding the incident and failed to sign the warrant. This court finds that the testimony was not so conflicting as to render it unreliable. Ferguson's father stated that another person was responsible for the shooting but he did not state that the other person committed the shooting. Two of the men who Ferguson believed had threatened him in a phone call at the hospital were black, which relates to the description that three black men accompanied defendant in the car on the day of the shooting. Although Booker and Mays did state that Ferguson was shot by a Mexican riding on a motorcycle, Ferguson maintained he was shot by a Mexican male accompanied by three black males. Even in light of these inconsistencies, the evidence was sufficiently consistent to render it reliable and, accordingly, the jury was able to weigh the aggravation value of the August 11 shooting.

Last of all, defendant argues that the testimony of police officer James Stewart regarding a taped statement given by arrestee Elliott Pennick was not relevant. Pennick was booked by Officers Ponce and Murrin just prior to the instant offense. However, this court finds that the fact that within an hour before Officer Murrin's death, he and Officer Ponce spoke at length with arrestee Pennick; that Officer Murrin had treated Pennick "excellent in all respects"; and that Officer Murrin looked healthy and happy when he and Officer Ponce left the police station are all relevant. The arrest of Pennick has a tendency to make it less probable that Officer Murrin acted aggressively toward defendant.

Thus, this court finds that the circuit court did not abuse its discretion in admitting the hearsay testimony of various witnesses.

IX

Defendant argues that his conviction must be reversed and his death sentence vacated because it was ex-

cessive and disproportionate in light of defendant's character and of the circumstances of the particular offense. The People argue that when each of defendant's arguments are scrutinized, the jury could have rationally found these factors to be insufficient to preclude imposition of the death sentence.

Defendant argues that because of his age, he should not be executed unless there exist overwhelming reasons to do so. He specifically refers to his lack of any significant history of prior criminal activity. While we agree that defendant is young, his prior encounters with law enforcement and his lifestyle belie his assertion of being a person of tender age.

On other occasions, defendant has used age as a method of avoiding the consequences of his criminal activity. When arrested in 1983, defendant told the police that he was 16 years old and subject only to limited criminal prosecution. Defendant was 17 at the time. Also, defendant's prior contact with law enforcement reveals a far more experienced individual than his age would indicate. For example, in 1983 defendant was arrested for the possession of a concealed .357 Magnum revolver and a buck knife. In 1984, a vehicle in which defendant and others were riding contained three .22-caliber handguns. Defendant had on his person at that time a buck knife and 20 rounds of .22-caliber long rifle ammunition. The People also introduced evidence that defendant was a member of the Latin Kings, a street gang, and that in August 1984 defendant shot a rival gang member. On the date of the instant offense, defendant had been with his best friend who was on a prison work release program. Prior to encountering Officer Murrin, defendant shot one of his guns in the air and picked up another gun at his friend Gates' house. Also on the date of this offense, defendant had, in addition to a gun, a pair of brass knuckles in his possession.

Defendant presented evidence at the hearing and also states on appeal that he was a respectful, friendly young man while in custody. Defendant argues that this evidence reveals a person who could be rehabilitated. However, the evidence of defendant's respect for the educational system, law enforcement and society in general do not support this argument. After defendant dropped out of high school, he was caught for a second time in possession of firearms less than two months after the first incident of illegal possession of firearms. After the gang shooting of Ferguson, defendant left the State despite his mother's requests that he turn himself in to the police. Defendant was even planning to leave again on the date of the instant offense.

Defendant relies on *People v. Carlson* (1980), 79 Ill. 2d 564. This court finds that defendant has misapplied *Carlson*. In *Carlson*, this court found that the imposition of the death penalty for the murder of a police officer was inappropriate because the circuit court should have considered as a mitigating factor that defendant's killing of the police officers was "part of one unfortunate and tragic event precipitated by the events leading up to killing" of the defendant's wife; the circuit court should not have allowed the arson and murder of the defendant's wife to preclude it from considering the mitigating effect of a prior life free of crime. This court also held that the circuit court erred in discounting the testimony of the psychiatrist, and in determining that defendant was not under extreme mental or emotional disturbances. This court, in *Carlson*, also noted that the defendant suffered a gradually debilitating physical ailment for two years prior to the offense. Thus, this court concluded that "these mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society."

In this case, defendant did not present evidence of any physical infirmity or mental disturbance which would mitigate the circumstance of the offense. Rather, the evidence revealed that defendant's prior history and his character were far from exhibiting a person with strong rehabilitative potential. Defendant did not act under extreme mental or emotional stress but under the sole motivation to escape capture and eventual arrest for a previous forcible felony. Although his previous contact with police does not reveal any resistance, he had every reason to resist in this case because of the outstanding felony warrant. Moreover, the offense in the case was not part of an unfortunate and tragic series of events precipitated by years of debilitating circumstances; rather, the years reveal an individual whose character and lifestyle had been deteriorating. The evidence also reveals that in his attempt to escape, defendant repeatedly shot Officer Murrin, who had been acting in the line of duty, and was the aggressor during the entire incident. These facts do "bespeak a man with a malignant heart." Thus, this court finds that the sentence of death was not excessive or disproportionate.

X

Defendant argues that this court should reconsider its position on the issue whether, when prospective jurors are excluded which might result in selection of a conviction-prone jury, defendant's right to a fair cross-section of the community is violated. This court has recently reconsidered its position concerning this issue in *People v. Thompkins* (1988), 121 Ill. 2d 401, and stated, citing *Lockhart v. McCree* (1986), 476 U.S. 162, 90 L. Ed. 2d 137, 106 S. Ct. 1758:

> " 'In sum, "*Witherspoon*-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to

> serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair cross-section requirement.' *Lockhart v. McCree* (1986), 476 U.S. 162, 176-77, 90 L. Ed. 2d 137, 150, 106 S. Ct. 1758, 1766." (*Thompkins*, 121 Ill. 2d at 450.)

Accordingly, this court finds that defendant's argument is without merit.

XI

Defendant argues that the death penalty statute contains inadequate safeguards to prevent arbitrary imposition of the death penalty. This court finds that defendant's argument has been addressed and, as such, declines to alter its previous holdings. *People v. Stewart* (1984), 104 Ill. 2d 463, 499-502; *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531.

XII

Defendant also argues that the death penalty statute violates the eighth and fourteenth amendments of the United States Constitution (U.S. Const., amends. VIII, XIV) because the statute limits the imposition of the death penalty to defendants who do not require special provisions or assistance, such as sign language translation, to be fit for trial. Since this court has addressed and rejected the argument, we find no merit in defendant's argument. *People v. Stewart* (1984), 104 Ill. 2d 463, 499-502.

XIII

Defendant also argues that the death penalty statute violates the eighth and fourteenth amendments in that it bars the jury at the death penalty hearing from considering sympathy for the defendant. Again, this court notes that this issue has been addressed in *People v. Stewart*

(1984), 104 Ill. 2d 463, 493-94, and as such, finds no merit in this argument.

For the foregoing reasons, defendant's conviction and sentence of death are affirmed. The clerk of this court is directed to enter an order fixing Tuesday, March 14, 1989, as the date on which the sentence of death entered in the circuit court of McLean County is to be implemented. The defendant shall be executed by lethal injection in the manner provided by section 119—5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1987, ch. 38, par. 119—5). The clerk of this court shall send a certified copy of the mandate of this court to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution wherein defendant is confined.

Affirmed.

JUSTICE CLARK, dissenting:

While I agree that the evidence below adequately supported the jury's verdict, I cannot agree with the majority's affirmance of the defendant's sentence and conviction. The trial of a close case, pivoting on the credibility of the accused, was marred by several serious evidentiary errors and an erroneous instruction to the jury. These errors, taken in combination, contributed to the defendant's conviction and cannot be considered harmless. I therefore respectfully dissent.

As a careful reading of the majority opinion makes clear, the evidence of the defendant's guilt was not overwhelming. The defendant's testimonial version of events—that he surrendered to the officer, that the officer beat him, and that he shot the officer during the course of an attempt to defend himself—was not entirely inconsistent with the evidence adduced at trial. It was corroborated by the fact that he had thrown away the gym bag with the gun in it before he was arrested and

by some of the testimony given by Pedro Palacios (*e.g.*, by the testimony that the defendant appeared at Palacios' house with his face bloody and swollen). A serious weakness in the State's case was the lack of evidence that the defendant had in fact committed the crime for which the officer was allegedly attempting to arrest him, and which is supposed to have motivated the defendant's flight and resistance to arrest. This evidence would have borne upon motive and upon the defense of justification. As can be seen from the sentencing hearing, the lack of evidence on this point was no accident—it stemmed from the prior victim's initial refusal to cooperate with the police and several inconsistencies in his story. It is unfortunate that the State attempted to remedy this weakness by reading the arrest warrant to the jury and introducing an instruction which told the jury, incorrectly, that the defense of justification is not available to a defendant who escapes after being "charged with" a crime. Since the jury might have inferred a violent character from the contents of the arrest warrant or thought that the fact of the arrest warrant meant that the defendant could not raise the defense of justification, these errors were not harmless beyond a reasonable doubt.

ADMISSION OF EVIDENCE OF THE FELONY ARREST WARRANT

The general rule in Illinois is that the fact that warrants have been issued for the defendant for previous crimes is admissible where relevant to show the defendant's motive for committing the crime charged but only if "the defendant knew about the warrant or knew that the officers were attempting to arrest him." (*People v. Wilson* (1987), 116 Ill. 2d 29, 52.) Even if the fact that the warrants were issued is admitted for this purpose, "proof of the details of such crimes is improper." *People v. Durkin* (1928), 330 Ill. 394, 404.

There is no showing in the record that the defendant knew about this warrant or knew that the officers were attempting to arrest him for the prior crime charged. The defendant himself testified that he fled from the police car because he had possession of an illegal gun. Without a showing that the defendant was aware of the warrant, the warrant itself does not prove anything about the defendant's state of mind. Moreover, the warrant itself was only an accusation; it was not relevant to prove that the defendant had committed the prior crime. The State did not attempt to prove, other than by the admission of the warrant, that the defendant actually had committed the prior crime, and that the prior crime, rather than the warrant, was his motive for fleeing the officers and killing one of them. Thus cases which the majority cites, such as *People v. Stewart* (1984), 105 Ill. 2d 22, are not pertinent—these cases all deal with proof of prior crimes, not proof that the defendant was aware that he was being sought in connection with these crimes.

Even assuming the warrant was admissible, it was also error to read the entire warrant to the jury, including the statement in the warrant that the defendant committed aggravated battery, a felony, "by shooting *** Frederick Ferguson in the leg while using a deadly weapon, to-wit, a shotgun." These were details of the crime that were highly prejudicial to the defendant since they tended to suggest a propensity to engage in violence. The majority opinion argues that these details were relevant because they showed the depth of the defendant's motive to escape and rebutted his contention that he was not the initial aggressor. Again, however, the majority opinion confuses the relevance of an accusation of a prior crime with relevance of a prior crime. Had the State introduced competent evidence to prove that the defendant had shot Frederick Ferguson, such

evidence would have tended to prove that the defendant, having committed the crime, had a strong motive to resist arrest. However, in the absence of such evidence, the details included in the warrant itself could not provide evidence of motive without a showing that the defendant was aware of what the warrant contained.

USE OF A NON-IPI INSTRUCTION

While the defendant cites as error the use of three instructions, all relating to the defense of justification, I believe that the only instruction which is truly important is People's instruction No. 18A, which stated: "A person is not justified in the use of force if he is escaping after he *has been charged with* the commission of a forcible felony." (Emphasis added.) This instruction varied from the Illinois Pattern Jury Instruction (IPI) which states that "[a] person is not justified in the use of force if he is ((attempting to commit) (committing) (escaping after the commission of)) a forcible felony." (Illinois Pattern Jury Instructions, Criminal, No. 24—25.10 (2d ed. 1981).) The IPI instruction tracks the language of the statute which provides that the defense of justification is not available to a person who "[i]s attempting to commit, committing, or escaping after the commission of, a forcible felony." (Ill. Rev. Stat. 1985, ch. 38, par. 7—4.) Under Supreme Court Rule 451, non-IPI instructions are not to be used unless they accurately state the law. (See *People v. Haywood* (1980), 82 Ill. 2d 540 (reversing where correct IPI instruction and incorrect non-IPI instruction were both given).) The difference between the two instructions is significant in this case, precisely because the State did not introduce any evidence that the defendant had committed a prior forcible felony, only that he had been *charged with* the commission of a prior forcible felony. Thus it is arguable that IPI Criminal 2d No. 24—25.10 should not have been given at all, let

alone in the incorrect variant actually introduced. The error reinforced the erroneous admission of the arrest warrant.

I am unable to understand the majority's reasoning on this point. At one point the majority appears to be arguing that there was evidence of a prior forcible felony. ("In this case, defendant immediately left the area after the commission of aggravated battery against Frederick Ferguson, a forcible felony for which there was an eventual arrest warrant." (126 Ill. 2d at 464.)) But, aside from the arrest warrant, a mere accusation, no evidence of a prior forcible felony was actually introduced at trial. At another point, the majority appears to argue that section 7—4 only requires proof that the defendant has been charged with a felony because being charged with commission of a crime is an element of escape. (126 Ill. 2d at 465.) This is wrong on two counts. First, section 7—4 requires *both* escape and actual commission of a crime, these requirements being stated in the conjunctive. Second, commission of a crime or a charge that the defendant committed a crime is only an element of felony escape, which is escape "from any penal institution or from the custody of an employee of that institution" (Ill. Rev. Stat. 1983, ch. 38, par. 31—6(a)). If the defendant committed escape at all, it was misdemeanor escape, which is defined as an intentional escape from the "lawful custody of a peace officer" (Ill. Rev. Stat. 1983, ch. 38, par. 31—6(c)).

Because I disagree that this instruction should have been given at all, let alone in an incorrect form, I would not reach the defendant's argument that IPI Criminal 2d No. 24—25.10 should not have been given anyway because it applies only where escape occurs immediately after the commission of a forcible felony.

ADMISSION OF EVIDENCE OF TWO ENTIRE PRIOR TAPED STATEMENTS OF PEDRO PALACIOS

On this issue I believe the majority opinion misses the point. Under section 115—10.1 of the Code of Criminal Procedure (Ill. Rev. Stat. 1985, ch. 38, par. 115—10.1), evidence of a prior inconsistent tape-recorded statement may be admitted as substantive evidence under certain conditions. The defendant concedes that certain parts of the prior tape-recorded statements of Pedro Palacios were inconsistent with his trial testimony (*e.g.*, whether the defendant had told him that he threw the gym bag away after his encounter with the officer (prior statement) or before (trial testimony)) but argues that only those inconsistent portions, and not the entire tapes, should be played to the jury. At the trial below, the State argued, and the trial court agreed, that all of the tapes could be played because, in their entirety, they tended to rebut Palacios' explanation that the inconsistencies were due to nervousness, confusion, and suggestive questioning by the interrogating officer. The trial court placed particular emphasis on the value to the jury of hearing Palacios' tone of voice.

The majority opinion does not accurately state the issue, saying that the defendant "specifically argues that Pedro's statements did not contain enough inconsistencies to be admitted into evidence as substantive evidence." (126 Ill. 2d at 456.) The opinion goes on to reject the view that the statute requires some minimal number of inconsistencies in a taped statement before it can be admitted. But this is not what the defendant is arguing; it is his argument that only the inconsistent statements should be played and the consistent portions redacted. The State argues, by analogy with the rule that a witness may be given the opportunity to show the circumstances under which an inconsistent statement was made, that it should be able to

use the tape to rebut the witness' explanation of the circumstances surrounding the inconsistencies.

This is a novel question, and one which, so far as I can discover, is one of first impression. The State appears to be arguing for the admission of the inconsistent portions as substantive evidence per the statute, and the consistent portions as reflecting on the witness' credibility. One problem with this argument is that the jury was not instructed to divide the statements in this fashion; it could have considered the consistent portions also as substantive evidence. Another problem is that the statute itself does not provide for the admission of taped statements to impeach credibility, rebut an attack on credibility, or, as in this case, refute an attempt by the witness to rehabilitate his credibility. I believe that in the absence of precedent, these portions should not have been admitted. Since they may have affected the jury's consideration of Palacios' explanation of the inconsistencies, and since Palacios' testimony was in general not favorable to the defendant, this error was prejudicial.

EVIDENCE OF VICTIM IMPACT

The general rule is that testimony that the deceased left behind a spouse or children is not admissible at trial because it has no bearing on the guilt or innocence of the accused. (*People v. Bernette* (1964), 30 Ill. 2d 359.) On the other hand, incidental references to the victim's family are permissible where relevant for some other purpose. I would agree with the majority that most of the testimony by the victim's wife was relevant as bearing on the victim's state of mind on the day in question; particularly in light of the defendant's claim that the victim was the aggressor and had been drinking. Evidence that the couple was not suffering from marital problems and that the officer was in good health was relevant to rebut the inference that he was drunk and aggressive. On the other hand, tes-

timony that they had been married 12 years and had an unspecified number of children was probably not relevant for this purpose.

I would agree these references, standing alone, would not mandate reversal. The reference to the length of the marriage was not objected to. And while the reference to children was objected to, it was certainly "inadvertant, incidental, and innocuous"—volunteered by the witness, and unprompted by any specific question. However, in combination with the other errors enumerated above, the admission of the length of the couple's marriage deprived the defendant of a fair trial.

I therefore believe that the defendant's conviction and sentence should be reversed, and the cause remanded for a new trial. While I would therefore not reach the issue of whether the defendant's death sentence was excessive, I agree with the majority that this case is distinguishable from *People v. Carlson* (1980), 79 Ill. 2d 564, because this defendant, unlike the defendant in *Carlson*, did not act under the influence of extreme emotional or mental disturbance and had some, although not an extensive, prior criminal history. On the other hand, the majority's assertions that the defendant's youth should be discounted because of his "lifestyle" and his prior use of his age as a "method of avoiding the consequences of his criminal activity" are unnecessary.

The majority's opinion illustrates the adage that hard cases make bad law. While any killing is terrible, the death of a police officer in the line of duty naturally evokes strong feelings among all members of the law enforcement community—judges included. Under these circumstances, any tendency to bend the rules of evidence in favor of a conviction, however natural, can and must be resisted. I therefore respectfully dissent.

JUSTICE STAMOS joins in this dissent.

Supreme Court, U.S.
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No. 94-1498

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

MANUEL SALAZAR,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

THE HOLDING OF THE ILLINOIS SUPREME COURT THAT RESPONDENT MANUEL SALAZAR WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN NO WAY CONFLICTS WITH THIS COURT'S OPINIONS IN LOCKHART v. FRETWELL AND STRICKLAND v. WASHINGTON.

Petitioner State of Illinois claims that the opinion of the Illinois Supreme Court below is in conflict with this Court's opinions in Lockhart v. Fretwell, 506 U.S. __, 122 L.Ed.2d 180 (1993) and Strickland v. Washington, 466 U.S. 668 (1984). That court held, on state post-conviction review, that Respondent Manuel Salazar had been deprived of the effective assistance of counsel in his direct appeal because his attorney had negligently failed to raise an issue upon which the court would have granted a new trial. This holding represents a straightforward application of controlling state and federal precedent. A fair reading of the opinion below reveals no conflict with either Lockhart or Strickland, and no basis for review by this Court on certiorari.

The Illinois Supreme Court held that counsel on direct appeal was ineffective for failing to argue that the murder/voluntary manslaughter instructions given at Respondent's capital murder trial were defective, as that court had earlier held in People v. Reddick, 123 Ill.2d 184, 526 N.E.2d 141 (1988). The court in Reddick found that the Illinois Pattern Jury Instructions on murder/voluntary manslaughter were contradictory, confusing, and in conflict with relevant provisions of the Illinois Criminal Code. The court found that these instructions indicated to jurors that as to the voluntary manslaughter charge, the prosecution had to prove the existence of a statutory mitigating mental state, which, as to the murder charge, the prosecution simultaneously contended did not exist. As a result, the instructions,

> (E)ssentially assure that, if the jury follows them, the jury cannot possibly convict a defendant of voluntary manslaughter. The reason is that even if a mitigating mental state is proved, it will have been proved by the defendant, not the People.
> Reddick, 526 N.E.2d at 145.

The Reddick court also noted that §3-2 of the Illinois Criminal Code (Ill. Rev. Stat., Ch. 38, §3-2) provided that if a defendant presented evidence of a mitigating mental state that would reduce a murder charge to voluntary manslaughter, then to sustain a murder conviction the prosecution had to disprove, beyond a reasonable doubt, the existence of that mental state. The Illinois murder/voluntary manslaughter instructions were further defective, and inconsistent with state law, by failing to place that burden on the prosecution. Reddick, 526 N.E.2d at 146.

Lastly, the Reddick court held that under applicable state procedural default rules, a defendant's failure to object to these defective instructions, to offer correct instructions, or to raise the issue in post-trial motions, did not result in default of the claim since the instructions involved "grave error." Not even the failure of a defendant to raise the issue on appeal would preclude the Illinois Supreme Court "from considering the correctness of those instructions on appeal and ordering new trials." 526 N.E.2d at 147.

Respondent Manuel Salazar's jury received the same murder/voluntary manslaughter instructions held defective in Reddick. Under Illinois law, had appellate counsel raised the instructional issue on direct appeal, Respondent would have been granted a new trial. Respondent's counsel, however, was admittedly unaware of the Reddick opinion, and failed to raise the issue in Respondent's direct appeal. As a result, Respondent's murder conviction and death sentence were affirmed by the Illinois Supreme Court. People v. Salazar, 126 Ill.2d 424, 535 N.E.2d 766 (1988).

In state post-conviction proceedings, Respondent asserted that he had been deprived of the effective assistance of counsel on direct appeal by his attorney's failure to raise the instructional error on which the Illinois Supreme Court had granted relief in Reddick. That court agreed, and reversed Respondent's conviction and remanded the case for a new trial. People v. Salazar,

162 Ill.2d 513, 643 N.E.2d 698 (1994). The Illinois Supreme Court's ruling represents a straightforward application of this Court's opinion in Strickland v. Washington, 466 U.S. 668 (1984), and of that court's opinion in People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989), which adopted the Strickland test in evaluating counsel's effectiveness on direct appeal, i.e., whether counsel's failure to raise an issue on direct appeal was objectively unreasonable, and whether a reasonable probability exists that had the issue been raised, the outcome of the appeal would have been different. 533 N.E.2d at 1096.

The Illinois Supreme Court first concluded that counsel's failure to have raised the instructional issue on direct appeal was objectively unreasonable, as counsel "could not account for or explain his failure to bring to this court's attention an allegation that Reddick error had occurred during [Respondent's] trial." 643 N.E.2d at 703. The Court next concluded that Respondent had met the "prejudice" standard of Strickand by demonstrating that a reasonable probability existed that, but for appellate counsel's omission, the outcome of Respondent's direct appeal would have been different. 643 N.E.2d at 703-5.

In its petition for a writ of certiorari, the State of Illinois first argues that the Illinois Supreme Court's opinion is in conflict with Lockhart v. Fretwell, 506 U.S. __, 122 L.Ed.2d 180 (1993), because the court did not address whether the instructional error that appellate counsel failed to raise was of constitutional magnitude. This argument is meritless, however, for it overlooks the fact that the constitutional basis of Respondent's post-conviction claim was the deprivation of his state and federal right to the effective assistance of counsel on direct appeal. (U.S. Const., amends. VI & XIV; Ill. Const. 1970, art. I, §8.) See Evitts v. Lucey, 469 U.S. 387,

396-97 (1985); People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989).[1]

It was unnecessary for the Illinois Supreme Court to determine, as a prerequisite to finding ineffective assistance of counsel, whether that instructional error was of constitutional magnitude. It is well established that an attorney may be constitutionally ineffective for failure to adequately protect his or her client's rights under applicable state statutes, rules, or case law. See, e.g., Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993) (Counsel held ineffective for failing to object to an erroneous jury instruction that misstated the mental state applicable to Louisiana's attempt murder statute.); Prichard v. Lockhart, 990 F.2d 352 (8th Cir. 1993) (Counsel held ineffective for failing to object to use of an out-of-state marijuana conviction to enhance defendant's sentence for marijuana possession, in violation of an Arkansas sentencing statute.); People v. Wilson, 149 Ill.App.3d 1075, 501 N.E.2d 863 (1st Dist. 1986) (Counsel held ineffective for failing to utilize a state law allowing admission of prior inconsistent statements as substantive evidence.) People v. Alcazar, 173 Ill.App.3d 344, 527 N.E.2d 325 (1st Dist. 1988) (Counsel held ineffective for failing to assert a state speedy trial statute as a bar to prosecution.); People v. Sagstetter, 177 Ill.App.3d 982, 532 N.E.2d 1029 (2nd Dist. 1988) (Counsel held ineffective for failing to assert a state statutory client-therapist privilege.)

Despite the State's argument, Lockhart v. Fretwell, 506 U.S. __, 122 L.Ed.2d 180 (1993) has no application to the present case. Fretwell held only that counsel's failure to make an objection that would have been supported by a decision which was subsequently overruled does not result in "prejudice" within the meaning of Strickland v. Washington, 466 U.S. 668 (1984). The Fretwell Court reasoned that,

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[1] Under the Illinois Constitution, a defendant sentenced to death is entitled to a direct appeal to the Illinois Supreme Court as a matter of right. Ill. Const. 1970, art. VI, §4(b).

> (A)n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.
> Fretwell, 122 L.Ed.2d at 189.

Consistent with Fretwell, the Illinois Supreme Court expressly recognized in Respondent's post-conviction appeal that ineffective assistance of counsel would only be found where counsel's representation,

> ...fell below an objectively reasonable standard of competence and where the deficiencies in counsel's representation prejudiced the defendant's defense at trial such that the defendant was deprived of a fundamentally fair trial.
> People v. Salazar, 643 N.E.2d at 412.

Had the Illinois Supreme Court subsequently overruled its decision in People v. Reddick that Illinois' murder/voluntary manslaughter instructions were defective, then Fretwell might require a different result here. But, that is not the case. The rule of Reddick remains the law in Illinois.

The proceedings against Respondent Manuel Salazar were fundamentally unfair and produced an unreliable result. The Illinois Supreme Court correctly held that Respondent therefore met the requirements of the "prejudice" prong of Strickland.

Petitioner State of Illinois next urges that certiorari be granted on the ground that the Illinois Supreme Court misapplied the "prejudice" prong of Strickland, by improperly placing the burden on the State to establish that appellate counsel's omission was harmless beyond a reasonable doubt, rather than placing the burden on Respondent to show that the outcome of his appeal would probably have been different had counsel raised the issue of the defective jury instructions. The State's argument, however, is based on a misunderstanding of the reasoning of

the Illinois Supreme Court, which is in complete compliance with the standards set forth in Strickland, and in that court's opinion in People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989) which adopted the Strickland test in evaluating an attorney's effectiveness on direct appeal.

The "prejudice" prong of Strickland required that Respondent demonstrate that the outcome of his direct appeal would probably have been different had counsel raised the defective jury instructions issue. The Illinois Supreme Court correctly recognized, however, that even if counsel had raised the issue on direct appeal, the outcome would not have been different if the State established that the error was harmless beyond a reasonable doubt. See People v. Shields, 143 Ill.2d 435, 445, 575 N.E.2d 538 (1991) (Holding that the instructional error described in Reddick is not per se reversible error, but is subject to a harmless error analysis). Therefore, as a necessary part of its Strickland analysis, the Illinois Supreme Court was required to first determine whether the instructional error at Respondent's trial was harmless beyond a reasonable doubt. Only if the answer to this question was negative would the outcome of Respondent's direct appeal have been different. Therefore, a finding that the instructional error in Respondent's case was not harmless beyond a reasonable doubt was a necessary element of the Illinois Supreme Court's analysis of whether the "prejudice" standard of Strickland had been satisfied.

Moreover, despite the State's assertion to the contrary, nowhere in its opinion below does the Illinois Supreme Court place the burden on the State to establish, in this post-conviction proceeding, that the instructional error was harmless beyond a reasonable doubt. Rather, the opinion simply points out -- accurately -- that had the instructional issue been raised on direct appeal, Respondent would have prevailed unless the State met its burden (in that direct appeal) to establish that the error was harmless beyond a reasonable doubt. In its opinion below, the court recognized that it is Respondent's burden to establish prejudice under Strickland, and merely

rejected the State's argument that Respondent failed to meet this burden because, according to the State, the record establishes that the instructional error was, as a matter of law, harmless beyond a reasonable doubt. Salazar, 643 N.E.2d at 412-13.

The controlling point in the present case is that the Illinois Supreme Court decided that, had the instructional error been brought to their attention in Respondent's direct appeal, that court would have granted Respondent a new trial on the ground that a properly instructed jury could have returned a voluntary manslaughter verdict. See Salazar, 643 N.E.2d at 513. As Illinois Supreme Court Chief Justice Bilandic noted in his concurrence below,

> Reddick was a significant opinion in the field of criminal law. Defendant's appellate counsel was not even aware of its existence. Had he been aware of Reddick and cited it, this court probably would have granted a new trial as it did in similar cases at that time. [citation omitted] In addition, the prosecution remained silent on the Reddick issue and this court did not raise it sua sponte. All of these circumstances persuade me to give the defendant a new trial. Salazar 643 N.E.2d at 416. (Bilandic, C.J., concurring)

The careful analysis undertaken by the Illinois Supreme Court in Respondent's post-conviction appeal makes clear that the court was aware of, and correctly applied, the Strickland "prejudice" standard in concluding that Respondent was deprived of his constitutional right to the effective assistance of counsel in his direct appeal.[2] Despite the State's argument, the opinion of the Illinois Supreme Court below in no way conflicts with this Court's opinions in Lockhart v. Fretwell and Strickland v. Washington.

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[2] Moreover, even in the absence of any constitutional deprivation, the Illinois Supreme Court possesses the supervisory authority to grant relief in state post-conviction proceedings. See e.g. People v. Davis, 156 Ill.2d 149, 619 N.E.2d 750, 756 (1993).

CONCLUSION

For the foregoing reasons, Respondent Manuel Salazar respectfully requests that the petition for writ of certiorari filed by the State of Illinois be denied.

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